SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Circuit Court of Appeals

SECOND CIRCUIT

IN THE MATTER

of

Petition of SAMUEL OKIN, stockholder of Electric Bond and Share Company, for a review of an order of the Securities and Exchange Commission dated the 7th day of September, 1944, pertaining to Electric Bond and Share Company, Electric Power & Light Corporation and United Gas Corporation, Files Nos. 70-314, 70-315, 59-21, 4-33, 54-91, 70-868.

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

The petition of Samuel Okin respectfully shows to this Court:

1. Your petitioner is the owner of Nine thousand (9,000) shares of the common stock of the Electric Bond and Share Company of a total of 5,250,357.66 shares of common stock outstanding. Petitioner is of the belief that he is one of the first five largest individual stockholders of record of a total of approximately 90,000 stockholders in said Electric Bond and Share Company.

2. Petitioner's said 9,000 shares of common stock has a present market value of approximately $100,000.00, and in petitioner's opinion said common stock has a value in excess of $225,000.00.

3. During 1930 and 1931 the Electric Bond and Share Company loaned to the United Gas Corporation the sum of $25,925,000 in cash for which the United Gas Corporation in December, 1931, made and delivered to the Electric Bond and Share Company its 6% demand note in the sum of $25,925,000, no part of which principal sum has been paid to date and the interest on which has been paid at fixed periods in the past. By reason of the aforesaid there is now owing to the Electric Bond and Share Company, the owner and holder of said note, from the United Gas Corporation, the principal sum of $25,925,000, with such interest thereon at the rate of 6% which may not as yet currently have been paid.

4. The Electric Bond and Share Company in 1935 loaned to the United Gas Corporation the sum of $3,000,000 in cash, at 6% interest, no part of which principal has been paid except the sum of $1,000,000, leaving a balance owing to the said Electric Bond and Share Company from the United Gas Corporation of the sum of $2,000,000, which now remains unpaid, the interest on which was paid at fixed periods in the past, and currently there remains unpaid only such interest at 6% as has not been paid.

5. The United Gas Corporation in 1936 owned $25,000,000 principal amount of 6% bonds of its subsidiary, United Gas Public Service Company, which the United Gas Corporation sold to the Electric Bond and Share Company, and received therefor the sum of $25,000,000 and accrued interest on said bonds, in cash. Thereafter the said United Gas Public Service Company was merged with the United Gas Corporation which assumed the payment of the aforesaid bonds which are now owned and held by the said Electric Bond and Share

Company, and no part of which principal sum of $25,000,000 has been paid, and the interest on which at the rate of 6% has been paid at fixed periods in the past. By reason of the aforesaid there is now owing to the Electric Bond and Share Company from the United Gas Corporation the said principal sum of $25,000,000 on said bonds, with such interest thereon at the rate of 6% which may not as yet currently have been paid.

6. The Electric Bond and Share Company purchased in the open market $400,000 principal amount of 5% First Mortgage Gold bonds of the Houston Gas Securities Company, a subsidiary of the United Gas Corporation, at a cash cost to the said Electric Bond and Share Company of $309,920. Thereafter the said Houston Gas Securities Company was merged with the United Gas Corporation which assumed the payment of said bonds, which are now owned and held by the Electric Bond and Share Company, and no part of which principal sum of $400,000 has been paid and the interest on which has been paid at fixed periods in the past. By reason of the aforesaid there is now owing to the Electric Bond and Share Company on said bonds from the United Gas Corporation the said principal sum of $400,000, with such interest thereon at the rate of 6% which may not as yet currently have been paid.

7. By reason of the facts alleged in paragraphs numbered "3" to "6", inclusive, the United Gas Corporation at the present time is indebted to the Electric Bond and Share Company in the sum of $53,365,000, with interest thereon at the rate of 6% with respect to the sum of $52,925,000 which may not as yet currently have been paid, and with interest on $440,000 at the rate of 5% which may not as yet currently have been paid, and no

part of which said principal sum of $53,365,000 has been paid.

8. In addition to the foregoing the Electric Bond and Share Company owns the following securities of the United Gas Corporation: 17,310 shares of the $7 preferred stock, cumulative, no par; 752,666 shares of common stock, no par value and, 151,005 option warrants for the purchase of common stock. The aforesaid securities owned by the Electric Bond and Share Company are carried on the books of said company at a value of $14,536,153.90 and represent a cash cost of $1,903,989.70 and $3,955,900.00 represents preferred stock issued for certain shares of said common stock.

9. The Electric Power & Light Corporation owns all the $7 second preferred stock of the United Gas Corporation consisting of 884,680 shares, cumulative, no par value, representing a capital stock liability of $88,468,000, and also owns 3,795,086 shares (48.54%) of the common stock of the United Gas Corporation and 3,600,040 option warrants (73.99%) of said corporation. As of June 1st, 1944, the arrearages on said second preferred stock amounted to $85.75 per share or a total of $75,861,310 on the said 884,680 shares.

10. The Electric Bond and Share Company owns the following securities of the Electric Power & Light Corporation, which represents a carrying value to the Electric Bond and Share Company, as shown by its books, of $36,606,915.55, of which sum $34,105,016.18 represents cash cost and $2,583,750 represents the portion acquired from Electric Investors, Inc., and which securities are as follows: 485 shares (.09%) of the $7 preferred stock, 13,905 shares (18.43%) of the $7 second preferred stock, 1,976,639 shares

(57.25%) of the common stock, and 393,408 warrants (72.23%); which said securities held by Electric Bond and Share Company represent 46.84% of the total voting power represented by all the securities of the Electric Power & Light Corporation. Upon information and belief that by reason of the aforesaid, the Electric Bond and Share Company has voting control of the said Electric Power & Light Corporation and United Gas Corporation.

11. In May, 1941, the United Gas Corporation and certain of its subsidiaries filed a declaration with the Securities and Exchange Commission seeking approval for the issuance and sale by United Gas Corporation of $75,000,000 principal amount of first mortgage and collateral trust bonds, 3¼% series due 1958, to fourteen insurance companies at a price of 99.34. It was proposed by United Gas Corporation that the net proceeds of such would be used:

(1) To retire $28,850,000 principal amount of United Gas Public Service Company debentures 6% due July 1, 1953, assumed by United Gas Corporation, $25,000,000 principal amount of which is held by Electric Bond and Share Company and $3,850,000 principal amount by Houston Gas Securities Company, all of whose capital stock was owned by the United Gas Corporation.

(2) To pay the 6% demand note of the United Gas Corporation in the principal amount of $25,925,000 held by Electric Bond and Share Company.

(3) To repay an open account indebtedness of $2,000,000 to Electric Bond and Share Company.

(4) To purchase $6,000,000 principal amount of First Mortgage and Collateral Trust Bonds, 4% series due 1961, to be issued by United Gas Pipe Line Company.

The said declaration stated that the corporation management of United Gas Corporation was considering recommending the use of a substantial portion of the remaining proceeds for payment of the dividend arrearages on the $7 preferred stock of United Gas Corporation then amounting to $9,502,490, but which has since been reduced to $3,654,804 as of June 1, 1944, and upon information and belief that said arrearages have been further reduced since June 1, 1944.

12. Concurrently in May, 1941, the Electric Bond and Share Company filed with the Securities and Exchange Commission its declaration wherein it sought permission to use the said sum of approximately $53,365,000, which it would receive from United Gas Corporation under the above specified declaration referred to in paragraph numbered "11" herein, together with some $6,000,000 from its own treasury to reduce its outstanding preferred stock.

13. As of December 31, 1943, the Electric Bond and Share Company had outstanding $94,944,700 of its $6 preferred stock which had been reduced by market purchases to $90,072,900 on May 27, 1944; and had outstanding on December 31, 1943, $24,599,700 of its $5 preferred stock which had been reduced to $22,530,000 by market purchases from December 31, 1943 to May 27, 1944.

14. That in the aforesaid declaration Electric Bond and Share Company proposed to apply the said $60,000,000 towards the reduction of its preferred stock liability by invitation of tenders, purchases in the open market, pro rata payment in liquidation, or by any other appropriate method.

15. On the 31st day of May, 1941, the Securities and Exchange Commission issued its Notice and Order for

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Company against the United Gas Corporation, now amounting to $53,365,000, to be recognized in full and the retention by the Electric Bond and Share Company of its stock interests in the United Gas Corporation which have a market value in petitioner's opinion of approximately $3,300,000.

19. During 1942, petitioner was granted permission by the Securities and Exchange Commission to participate in the aforesaid consolidated proceeding and did participate therein.

20. Shortly prior to the 6th day of March, 1944, the United Gas Corporation filed with the Securities and Exchange Commission what is claimed to be a plan of reorganization of the said United Gas Corporation under the provisions of Section 11(e) of the Public Utility Holding Company Act of 1935, which said alleged plan was joined in by said Electric Bond and Share Company and Electric Power & Light Corporation.

21. The said alleged plan as filed with the Securities and Exchange Commission by the United Gas Corporation, as referred to in paragraph numbered "20" herein, proposes:

(1) United Gas Corporation will file an amendment to its previously described filing herein (File No. 70-314) in which amendment it will seek approval of the issuance and sale of the sum of $100,000,000. principal amount of First Mortgage and Collateral Trust Bonds.

(2) Electric Power & Light Corporation will acquire from Electric Bond and Share Company for a cash purchase price of $44,000,000 the following claims in and against United Gas Corporation held by Electric Bond and Share Company:

(a) $25,000,000 principal amount of 6% debentures, due 1953, of United Gas Public Service Company assumed by United Gas Corporation.

(b) The 6% demand note of the United Gas Corporation in the principal amount of $25,925,000.

(c) The 6% open account indebtedness from United Gas Corporation to Electric Bond and Share Company of $2,000,000.

(d) $440,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company assumed by United Gas Corporation.

(e) 17,310 shares of $7 preferred stock, 752,666 shares of common stock, 151,005 option warrants for the purchase of common stock of United Gas Corporation.

(3) Electric Power & Light Corporation will surrender to United Gas Corporation as a capital contribution the 17,310 shares of $7 preferred stock of United Gas Corporation acquired by it from Electric Bond and Share Company in the transaction described in paragraph (2) above and United Gas Corporation will cancel the said shares.

(4) United Gas Corporation will redeem and cancel the 432,512 shares of $7 preferred stock held by the public at their redemption price of $110 per share plus accumulated dividends thereon to the redemption date, employing for such purpose so much of the proceeds of the sale of its First Mortgage and Collateral Trust Bonds as may be necessary therefor (approximately $53,000,000).

(5) United Gas Corporation will declare and pay a dividend on its $7 second preferred stock, all of which

is held by Electric Power & Light Corporation, of 12,385,520 shares of its $1 par value common stock, and Electric Power & Light Corporation will accept such stock dividend in payment of $12,385,520 of the accumulated and unpaid dividends on such stock.

(6) Electric Power & Light Corporation will surrender to United Gas Corporation for cancellation 444,680 shares of United Gas Corporation's $7 second preferred stock together with all rights to accumulated undeclared dividends thereon and will receive in exchange therefor 44,468,000 shares of the $1 par value common stock of United Gas Corporation.

(7) United Gas Corporation will purchase from Electric Power & Light Corporation for $44,000,000 in cash, its remaining 440,000 shares of second preferred stock having a stated value of $44,000,000 and Electric Power & Light Corporation will also transfer to United Gas Corporation the right of Electric Power & Light Corporation to accumulated and unpaid dividends on such stock. United Gas Corporation will derive the $44,000,000 in cash from the proceeds of its sale of First Mortgage and Collateral Trust Bonds and Electric Power & Light Corporation will use the $44,000,000 received by it to discharge its obligation arising in connection with its acquisition of securities of United Gas Corporation from Electric Bond and Share Company as described in paragraph (2) above.

(8) Electric Power & Light Corporation will surrender to United Gas Corporation as a capital contribution the securities and open account indebtedness of United acquired by Electric Power & Light Corporation from Electric Bond and Share Company as described in paragraph (2) above (exclusive of the

17,310 shares of United Gas Corporation's $7 preferred stock previously surrendered as described in paragraph (3) above) together with option warrants for the purchase of 3,600,040 shares of the common stocks of United Gas Corporation.

(9) United Gas Corporation will pass a resolution entitling its common stockholders to two-thirds of a share of common stock for each share of such stock then held and, in connection therewith, will cause to be transferred from Capital Surplus to Stated Capital the sum of $42,613,209 to cover the capital liability to be represented by the additional shares of stock so to be issued and to render such shares fully paid and non-assessable.

(10) United Gas Corporation will use the remaining proceeds of the sale of its First Mortgage and Collateral Trust Bonds together with such additional cash in its treasury as may be necessary to redeem and cancel $3,460,000 principal amount of publicly held 5% Collateral Trust Gold Bonds of Houston Gas Securities Company, due March 1, 1952, assumed by United Gas Corporation.

(11) United Gas Corporation will amend its certificate of incorporation so as to eliminate the authorization of the $7 preferred stock and the $7 second preferred stock and to reclassify the 106,533,022 shares of then outstanding $1 par value common stock into 10,653,302.2 shares of $10 par value common stock and will exchange the certificates for the new shares of common stock for the certificates for the outstanding common stock on the basis of 1 share of new stock for 10 shares of old stock. Provisions are then made as to fractional shares of stock and for the revocation of outstanding option warrants for the pur-

chase of common stock of United Gas Corporation and for their abrogation and cancellation and non-participation in the plan.

22. On the 6th day of March, 1944, the Securities and Exchange Commission issued its Notice of Filing of Section 11(e) Plan and Application or Declaration (Or Both) Under Section 12(c), Order of Consolidation, and Notice of and Order for Hearing wherein the said Commission ordered that the proceedings with respect to said Plan filed pursuant to Section 11(e) of the Act and the said application or declaration (or both) filed by Electric Bond and Share Company and the pending consolidated proceedings under Sections 6, 7, 9(a), 10, 11(b)(2), 12 and 18 of the Act (File Nos. 70-314, 70-315, 59-21, 4-33) be consolidated to the extent of consideration by the Commission of the issue involved, and the record in the pending consolidated proceedings be incorporated in the consolidated proceedings directed under the order of March 6th, 1944.

The said order of the Securities and Exchange Commission dated the 6th day of March, 1944, ordered that a hearing be held in the consolidated proceedings on the 4th day of April, 1944 before its Trial Examiner William W. Swift and that all persons desiring to be heard or otherwise wishing to participate in the proceedings shall notify the Commission in the manner provided by its Rules of Practice, Rule XVII, on or before April 1, 1944.

23. The said order of the Securities and Exchange Commission dated the 6th day of March, 1944 further provided:

"IT IS FURTHER ORDERED that without limiting the scope of the issues presented in the consolidated proceedings particular attention will be directed at the

hearings to the following matters and questions in addition to those stated in the order of this Commission referred to above, dated May 31, 1941:

1. Whether the plan as submitted or as hereafter modified is necessary to effectuate the provisions of Section 11(b) of the Act.

2. Whether the proposed plan as submitted or as hereafter modified is fair and equitable to the persons affected thereby.

3. Whether the proposed acquisition of shares of its preferred stocks by Bond and Share, and the method proposed therefor, is appropriate and in the public interest and in the interest of investors, and in conformity with the standards of Section 12(c) of the Act.

4. Whether, if the transactions proposed are authorized by the Commission, it is appropriate in the public interest and in the interest of investors and consumers that any terms and conditions be imposed in connection with such authorization and, if so, what such terms and conditions should be.

5. Whether the fees and expenses proposed to be paid in connection with the consummation of the Plan and all transactions incidental thereto are for necessary services and are reasonable in amount.

6. Whether the Commission shall, in accordance with the petition of the parties to the Plan, take and exercise jurisdiction to fix and determine the amounts of the payments, if any, to be made by United or Electric to the plaintiffs or their attorneys in the legal proceedings specifically enumerated in the plan, by way of reimbursement or disbursements or allow-

ances for legal service and, if so, what action it should take in the exercise of such jurisdiction.

7. Whether the accounting entries in connection with the proposed transaction are in conformity with the standards of the Act and Rules promulgated thereunder.

8. Generally, whether the proposed transactions are in all respects in the public interest and in the interest of investors and consumers and consistent with all applicable requirements of the Act and Rules thereunder."

24. The said order of the said Commission further provided:

"IT IS FURTHER ORDERED that United, Electric and Bond and Share shall give notice of this hearing to all their security holders (insofar as the identity of such security holders is known or available to them) by mailing to each of said persons a copy of this Notice and Order for Hearing at his last known address at least 20 days prior to the date of this hearing."

25. Pursuant to the aforesaid provisions of the said order of the Securities and Exchange Commission dated the 6th day of March, 1944, in said consolidated proceedings, as aforesaid, petitioner received by mail a copy of the said order of the said Commission, together with a copy of the plan and a copy of the letters with respect thereto being sent by the said Electric Bond and Share Company, Electric Power & Light Corporation and United Gas Corporation, to their respective stockholders. Pursuant to the said order of the Securities and Exchange Commission and the applicable provisions of the Public Utility

Holding Company Act of 1935 and the Rule of the said Commission purporting to have been promulgated thereunder, petitioner filed with the said Commission his application to intervene in the said consolidated proceedings which said application contained the following statements by petitioner after stating in substance many of the facts hereinbefore referred to as to the matters involved:

> "It was deponent who strenuously objected to the proposed subordination of the obligations due Electric Bond and Share Company from United Gas Corporation, as hereinbefore described, and who succeeded in stopping such proposed subordination.
>
> At the request of Electric Bond and Share Company, on September 21, 1943, a hearing was held in said consolidated proceeding for the purpose of taking the testimony of Ralph B. Feagin, who was the active president of the United Gas Corporation from June 3, 1930 until the spring of 1933, and testified at great length as to transactions between Electric Bond and Share Company, the United Gas Company, and the United Gas Corporation resulting in the present indebtedness of the United Gas Corporation to the Electric Bond and Share Company other than $2,000,000 loan. It is deponent's opinion that the said testimony of the said Feagin uncontradicted in the record is conclusive proof of the absolute validity of the said present indebtedness of the United Gas Corporation to the Electric Bond and Share Company. On the 21st day of September, 1943, the said consolidated hearing was *again* closed and although deponent requested permission of the Securities and Exchange Commission shortly thereafter to argue the matters, deponent was informed in substance that no determination had been made as to the procedure to be followed in this matter. At no time prior to the

6th day of March, 1944, was any order made by the Commission as to the matters which had been the subject matter of the said consolidated proceeding determining the same insofar as the said Commission had any jurisdiction, but on the contrary in apparent continuation of the efforts of the staff of the Commission to unjustly and illegally, in deponent's opinion, prevent payment of what deponent is fully satisfied is the absolute and unqualified obligations of United Gas Corporation to Electric Bond and Share Company, it now appears that various discussions have been held by the staff of the Commission with officers of the Electric Bond and Share Company, Electric Power & Light Corporation and United Gas Corporation, as a result of which there has been filed with the Commission a plan joined in by United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company, wherein among other things it is contemplated in some wholly indirect and what would appear to be detrimental manner, that Electric Bond and Share Company receive $44,000,000 for its holdings of $53,365,000 of debt securities of United Gas Corporation, 17,310 shares of $7 preferred stock, 752,666 shares of common stock and option warrants to purchase 151,005 shares of common stock, of the United Gas Corporation. The securities other than the debt securities on March 6, 1944 had a current market value of $3,900,000. If such a proposed transaction is consummated, it will result in the reduction of surplus of the Electric Bond and Share Company of $23,770,000.

* * * * * * *

It is deponent's opinion not only that this proposed plan is in its entirety highly objectionable to Elec-

tric Bond and Share Company, in that it contemplates what deponent considers the making of a gift by Electric Bond and Share Company of assets having a present value in deponent's opinion of approximately $13,000,000; but in addition the mechanics of the proposed plan are so highly detrimental to Electric Bond and Share Company and its stockholders, that the grave legal problem will arise as to the right of Electric Bond and Share Company's officers and directors to permit United Gas Corporation to purchase 440,000 shares of the second preferred stock of United Gas Corporation for the sum of $44,000,000. The next substantial question of law presented would be what right legally would the Electric Power & Light Corporation and its officers and directors have to take $44,000,000 acquired by that company and turn the same over to Electric Bond and Share Company for certain assets of that company which it is contemplated to surrender to United Gas Corporation. If deponent was of the belief that the so called master minds who have been obviously responsible for the creation of this plan, would alone sustain the losses which deponent is firmly convinced would arise thereby, deponent might look at the matters in a different light, but since deponent realizes that only Electric Bond and Share Company and its stockholders are the real victims of the activities of the staff of the Securities and Exchange Commission and acquiesced in by the management of the Electric Bond and Share Company under the proposed plan, deponent is determined to prevent such occurrences.

The proposal of Electric Bond and Share Company to use $44,000,000 in purchasing on the New York Curb Exchange its preferred stock, when at the present time it has unexpended approximately $10,000,000

in cash and securities which the Commission authorized for such use, is too absurd to even be the subject matter of any comment. This merely illustrates again the obvious determination of the management of Electric Bond and Share Company not to employ the customary method of tender even though the preferred stocks of the company are presently selling above 90. The earned surplus of the company is being continuously substantially reduced as a result of payment of preferred dividends and yet the management with the approval of the Commission, heretofore given, continues to employ only purchases on the New York Curb Exchange which in deponent's opinion is most detrimental. The plan recites that Electric Bond and Share Company joins in the said plan upon the further condition that the Commission, concurrently with or prior to its approval of the plan, issues its order making effective the declaration or application filed by Electric Bond and Share Company, for the use by it of all or any part of the $44,000,000 received by it from Electric Power & Light Corporation in the acquisition and retirement of its preferred stock. It is important to note however that in the declaration, Electric Bond and Share Company also seeks the right to use all or any part of the unexpended portion of such cash in connection with any other plan for the reduction of its outstanding preferred stock which may hereafter be submitted by the company to the Commission and approved by it. Since no such plan accompanies the declaration it is obvious that no such plan can be approved by the Commission as part of the declaration. Therefore it is impossible to conceive how the Commission can on the present declaration of Electric Bond and Share Company approve the same.

To completely present all the objections which deponent has to the above entitled presently consolidated proceeding would cause this affidavit to be extremely voluminous, and deponent therefore is not attempting to state all his objections and wants it specifically understood that the foregoing does not represent all his objections.

Deponent's experience before the Securities and Exchange Commission in the past, and the facts as appearing in this matter, have fully proven to deponent that the only person upon whom deponent can rely in these proceedings to protect his substantial interests as a stockholder of Electric Bond and Share Company is deponent, and that by reason the aforesaid it is most essential to the interests of deponent that he be permitted to intervene in these proceedings, to the extent that he has not been granted participation heretofer, so that he may take the necessary precautions to protect his interests herein.

WHEREFORE deponent respectfully asks that he be permitted to intervene in the above entitled consolidated proceedings, to the extent that he has not heretofore already been granted participation."

26. On the 4th day of April, 1944, Trial Examiner William W. Swift of the Securities and Exchange Commission granted to petitioner the right to participate in the said consolidated proceeding which included leave to call and examine witnesses, to offer documentary evidence and to cross-examine witnesses.

27. Petitioner thereafter participated in the said consolidated proceeding before the Securities and Exchange Commission and cross-examined witnesses produced by the United Gas Corporation, Electric Bond and Share

Company and Electric Power & Light Corporation and alleged claimants in said consolidated proceedings.

28. Petitioner hereby reaffirms, reiterates and restates each and every statement made in his aforesaid affidavit for intervention as hereinbefore more fully referred to in paragraph numbered "25" herein, and hereby incorporates into this petition the said statements as though the same had been made herein without being quoted.

29. During the course of the said consolidated proceedings petitioner was compelled to make a motion on or about April 12th, 1944 to set aside rulings of the said Trial Examiner to which exceptions were duly taken and which rulings petitioner respectfully states in his opinion frustrated the efforts of petitioner to protect his substantial interests and to elicit the proof which petitioner sought to elicit to substantiate his objections to the matters which were the subject matter of the said consolidated proceeding, and which rulings petitioner respectfully states in his opinion deprived petitioner of his property rights without due process of law in violation of the Constitution of the United States and in violation of the provisions of the Public Utility Holding Company Act of 1935 and its expressed intent and purpose. In the said motion filed with the said Securities and Exchange Commission, as aforesaid, deponent made the following statements, which are hereby made part of this petition:

"The undersigned participant in the above entitled consolidated proceedings and owner of Nine thousand (9,000) shares of the common stock of Electric Bond and Share Company hereby moves the Commission to forthwith set aside the rulings of Trial Examiner William W. Swift on the hearing in the above en-

titled proceedings pursuant to the orders of the Commission dated the 6th and 25th days of March, 1944, as to which rulings the undersigned participant took exception on the record, on the ground as hereinafter referred to, that said rulings are presently preventing this participant from eliciting the evidence in the consolidated proceeding which is material and necessary to the protection of the valuable property rights owned by this participant and is preventing this participant from obtaining a hearing before the Commission such as is contemplated by due process of law as guaranteed by the Constitution of the United States and which rulings constitute a deprivation of property rights owned by participant without due process of law.

In the order of the Commission dated the 6th day of March, 1944, the following is referred to as two of the issues in said consolidated proceeding:

'2. Whether the proposed plan as submitted or as hereafter modified is fair and equitable to the persons affected thereby.

* * * * * * *

8. Generally, whether the proposed transactions are in all respects in the public interest and in the interest of investors and consumers and consistent with all applicable requirements of the Act and Rules thereunder.'

Under the provisions of the order of the Commission dated the 25th day of March, 1944, the issues referred to in the order dated the 6th day of March, 1944, are also made applicable to the amendment to the joint declaration designated File No. 70-314.

The plan as proposed and the amendment to the said joint declaration, which are the subject matter of this consolidated proceeding, create certain fundamental issues which vitally affect the interests of stockholders of the Electric Bond and Share Company. The primary question is why and under what circumstances is it proposed that the Electric Bond and Share Company accept $44,000,000 in payment of the securities of the United Gas Corporation which have a value of $57,000,000, thereby causing a loss of approximately $2.50 per share of common stock of the Electric Bond and Share Company? The next important question is why do the parties resort to the method indirectly of having Electric Power & Light Corporation sell 440,000 shares of the Second Preferred Stock of the United Gas Corporation to the United Gas Corporation and then have the Electric Power & Light Corporation use the said $44,000,000 to buy the said securities from the Electric Bond and Share Company, which the plan then contemplates the Electric Power & Light Corporation will contribute to the United Gas Corporation as a capital contribution? Such proceedings inevitably lead to new law suits and certainly are a very poor method of alleged settling of old claims.

It is obvious that under the orders of this Commission, this participant had the right to question the officers of Electric Bond and Share Company and Electric Power & Light Corporation as to all conversations leading up to and in any way connected with the plan and declaration and amendments which are the subject matter of this consolidated proceeding. Realizing that the elementary basic rules of law authorize questions pertaining to conversations connected with the matters which are the subject mat-

ter of a proceeding which had as its very foundation the question of fairness to persons affected thereby, this participant on the consolidated hearing propounded questions on cross-examination of witnesses which sought to elicit from the witnesses, who were officers of the declarant corporations, the conversations between officers of the declarant corporations which lead to the filing of the present plan and declaration and amendments thereto, and conversations between said officers of the declarants and members of the staff of the Commission which are referred to in the said Plan, the letters sent to stockholders with respect to same and the testimony of the said witnesses directly on these consolidated proceedings.

The rulings of the Trial Examiner which are the subject matter of this motion can be divided into three classes:

A. The sustaining of all objections to questions by this participant as to conversations between the officers of the declarant corporations and members of the staff of the Commission.

B. The sustaining of objections to certain questions by this participant as to conversations between the officers of the declarant corporations at times when the staff of the Commission were not present.

C. The refusal of the Trial Examiner to strike from the record answers of witnesses which were not responsive to questions propounded by this participant and the refusal of the Trial Examiner to direct the witness to answer the questions.

* * * * * * *

The staff of the Utility Division of the Securities and Exchange Commission, the members of the Com-

mission and any one connected with the Commission are not granted immunity under the provisions of the Public Utility Holding Company Act of 1935 or any other Act of Congress.

This participant is seeking to establish that the staff of the Securities and Exchange Commission are directly responsible for the present filing of the said plan and the amendment to the said declaration which if ever declared effective this participant will sustain a loss of approximately $25,000 and the common stockholders of the Electric Bond and Share Company as a class sustain a loss of approximately $13,000,000. This is not a trivial amount and whoever is responsible for the situation should assume the detriment which may or may not result therefrom. The record demonstrates very conclusively that members of the staff of the Utility Division of the Commission have been directly involved in the creation of the matters which are now the subject matter of this proceeding. If the said staff members have lawfully performed their administrative duties and if no harm to any person has been caused which can be attributed to any improper act of the said staff members, what are they afraid of? Of course, it is obvious, that if the staff members have used their administrative positions granted to them by an Act of Congress to foster an improper use of such office as a result of which a great wrong or wrongs are being perpetrated, the staff members would be very anxious to prevent the uncovering of such acts. It seems to this participant that the Commission, however, would be most anxious to eliminate any question of impropriety on the part of any of its members and that the Commission would be most anxious to prove to all investors that its staff is most impartial and

is not using its offices to favor any one group of stockholders of any company as against any other group of stockholders in the same or any other company.

Let me just briefly refer to the facts in this record which demonstrate conclusively that the present plan and amendment to the declaration are the direct result of the activities of the staff of the Commission, and anyone who dares contend to the contrary is either a knave or a fool.

At page 12 of the plan appears the following:

'A. BOND AND SHARE: In light of the matters set out in Part III above, it has become increasingly evident to Bond and Share, although it denies that the questions raised with respect to the validity and position of its investments in United in proceedings before the Commission mentioned in Part III, and the claims of the plaintiffs in the stockholders' derivative actions enumerated therein, have any foundation either in fact or law, that a determination of the issues raised through court action would be lengthy, expensive and subject to the usual uncertainties of such procedure. In these circumstances, and after discussions with the staff of the Commission and with the officers of and counsel for United and Electric, Bond and Share has determined that the compromise and settlement of its interests in and claims against United and the other transactions proposed in the plan are for the best interests of its stockholders, both preferred and common, and joins in and becomes a party hereto but without prejudice to and with full and complete reservation of all its constitutional and legal rights in the event that the plan as sub-

mitted, or as modified with its consent, shall not be fully performed and consummated subject to the terms and conditions contained in the plan.'

In its letter dated March 6, 1944, to its stockholders, Electric Bond and Share Company at page two thereof states:

'Hearings before the SEC on the United Gas 1941 Plan extended over a period of almost two and a half years and involve about 9300 pages of testimony and 1100 exhibits. We have maintained throughout these proceedings that Bond and Share was entitled to recover the full amount of United Gas obligations to your Company, as was indicated in a policy statement by your Company's President at the last annual stockholders' meeting. However, after extended discussions with the staff of the SEC the directors and officers concluded that the claims of Bond and Share would not be recognized in full. Legal determination of the company's position could only be obtained after protracted litigation—perhaps three years.

This would drastically cut income through probable suspension of $3,200,000 of annual interest from United Gas during litigation, thus requiring omission or reduction of dividends on Bond and Share's preferred stocks, disrupting its financial program, and seriously interfering with carrying out plans for meeting the problems created by the Holding Company Act. Furthermore, assuming success in litigation to set aside any SEC order for lack of authority to make it, it would still be necessary to face the pending law suits already referred to.'

At page one of the letter of United Gas Corporation to its stockholders dated March 6, 1944, appears the following:

'As you will see on pages 8 and 9 of the Plan, your company filed with the Commission, on May 5, 1941, an application for the refinancing of the Company; other proceedings were instituted and other issues were raised before the Commission and in the Courts. After extended hearings before the Commission and conferences with the Commission's staff the parties to the plan arrived at the settlement which is incorporated in the plan.'

Electric Power & Light Corporation in its letter to its stockholders dated March 6, 1944, on page one thereof makes the following statements:

'As you have been informed in the annual reports of Electric and other communications, a proceeding before the Securities and Exchange Commission with reference to United, its conformity to the requirements of the Public Utility Holding Company Act and its relationship to Bond and Share and to Electric, was commenced by the Commission on May 31, 1941 and was consolidated with a financing application which had been filed by United shortly prior thereto. The issues raised by the Commission in this proceeding were many and complicated. The hearings have consumed an enormous amount of time and a voluminous record has been assembled with reference to the issues thus raised. In addition, various litigation have been instituted in the New York and Federal courts by stockholders of United and Electric, raising some of the same isues which have been raised in the Commission proceedings and certain similar issues.

The Plan has for its purposes, among other things, the simplification of the capital structure of United, by converting it into a capital structure consisting only of common stock, and debt, and the effecting of a fair and equitable distribution of voting power among the

security holders of United. In addition, the Plan is designed to effect the settlement and discharge of all issues which have been raised in the proceedings and litigations above referred to, whether arising under the Public Utility Holding Company Act or out of the intercorporate relationships of United and its parents. The Plan represents the culmination of protracted negotiations and was arrived at after consultation with the staff of the Securities and Exchange Commission.' Upon the hearing, Mr. Murphy, President of Electric Bond and Share Company, and Mr. Gill, President of Electric Power & Light Corporation and United Gas Corporation also testified on direct examination that the proposed plan and settlement represents the results of many conversations with the staff of the Commission. Under such circumstances and in the face of these undisputed facts, the Trial Examiner repeatedly sustained all objections to all questions propounded by this participant as to the substance of conversations between the officers of the declarant corporations and the staff of the Commission. How can anyone intelligently argue that such conversations and the proof thereof are not material and relevant in the determination of the issues before the Commission as to whether such plan is fair and equitable and as to whether the stockholders of the companies involved are not being taken advantage of?

In its letter to its stockholders (supra), Electric Bond and Share Company, states: 'However, after extended discussions with the staff of the SEC the directors and officers concluded that the claims of Bond and Share would not be recognized in full. Legal determination of the company's position could only be obtained after protracted litigation—perhaps three years.'

What member of the staff informed the officers and directors of Electric Bond and Share Company that

the claims of Bond and Share 'would not be recognized in full', and what authority had any such staff member or members of the Commission to make any such assertions? Since when are the statements of the staff members of the Commission of any binding force upon the Commission? Who of the staff members of the Commission who allegedly conferred with said officers and directors undertook to advise them in advance of any formal determination of the Commission as to what such determination would be and who undertook to know what the Commission would do in the future after the submission of the case to it? Who of the staff members had the authority to make any representations as to the future activities of the Commission sufficient to justify the Electric Bond and Share Company to convey these representations as aforesaid to its stockholders?

Who of the staff members of the Commission had any authority to make any statements to the officers and directors of the Electric Bond and Share Company upon which they predicated the following statements in the said letter of March 6, 1944 to its stockholders (p. 2):

'This would drastically reduce income through probable suspension of $3,200,000 of annual interest from United Gas during litigation, thus requiring omission or reduction of dividends on Bond and Share's preferred stocks, disrupting its financial program, and seriously interfering with carrying out plans for meeting the problems created by the Holding Company Act. Furthermore, assuming success in litigation to set aside any SEC order for lack of authority to make it, it would still be necessary to face the pending law suits already referred to.'

It is obvious from the foregoing that the staff of the Commission must have represented to the officers and directors of the declarant companies that unless this matter is settled for the sum of $44,000,000 and Electric Bond and Share Company turns over all its securities of the United Gas Corporation having a value of approximately $57,000,000 for said amount, that the Commission would take certain very drastic steps against Electric Bond and Share Company. If the foregoing is not the fact, then Electric Bond and Share Company deliberately misrepresented the true facts to its stockholders in its said letter. If it is the fact then the staff of the Utility Division of the Securities and Exchange Commission have deliberately violated their office by using the same to compel unlawfully the deduction of the sum of $13,000,000 lawfully due the Electric Bond and Share Company.

In any event the facts as to what actually transpired in these so-called meetings with the said staff members is the most vital part of this proceeding and only by eliciting the facts as the same can it be possible to determine to what extent, if any, the staff of the Commission brought pressure to bear upon the officers and directors of the declarant company to compel the settlement of the claims of Electric Bond and Share Company against United Gas Corporation for a sum approximately $13,000,000 less than the amount due thereby creating a gift in the sum of $13,000,000 approximately for the said stockholders of United Gas Corporation.

The last official word of the Commission as to the matters involved in this proceeding appeared in its Release 3301 dated January 31, 1942 wherein the Commission stated at page 4 thereof:

'Before proceeding to describe subsequent developments, it seems appropriate to refer briefly to the origin and history of the items of alleged indebtedness to Bond and Share totalling $52,925,000, and to indicate briefly the considerations which appeared to the staff to preclude approval or disapproval, *at the present time and on the present record,* of the proposal to repay such indebtedness out of the proceeds of the financing. In setting forth these matters, it should be clearly understood that we are in no sense making definitive findings of fact, nor passing in any way upon the ultimate issues relating to the validity and ranking of the indebtedness or other matters. Indeed, the very reason for exploring other possible interim courses of action at this time (as described below) is our inability, in the present state of the proceedings, to make such findings or pass upon such issues at the present time. Our purpose in setting forth this recital is merely to outline the general factual background which, in the view of members of the staff who have represented the Public Utilities Division of the Commission in these proceedings, appeared at least to raise substantial questions which would require careful consideration before approval could be given to any proposal to pay such indebtedness in full.'

The Commission further stated at page 9 of said Release 3301:

'At this time we are not in a position to reach any conclusion, in any manner or degree whatsoever, as to whether any violation of such fiduciary obligations may or may not have occurred, and if any occurred, as to what the consequences might be. The foregoing recital should not in any sense be construed as constituting or indicating any such conclusion. Indeed, it

is not in any sense intended to be a definitive statement or "finding" concerning the matters referred to, or a complete statement of all relevant facts and considerations. As stated previously, we set these matters forth at this time merely in order to give some indication of the reason for our inability to approve presently the proposal to liquidate completely the items of alleged indebtedness totalling $52,925,000; namely, that certain evidence in the record seems to present, at least prima facie, various substantial and difficult questions of law and equity which must be further considered and resolved before authorization could be given for full payment of the principal of the indebtedness to Bond and Share.'

This last official word of the Commission certainly could in no way shape or manner be used as any basis by any member of the staff of the Commission to justify the statements which must have been made to the officers and directors of the Electric Bond and Share Company upon which they predicated the statements in its letter as hereinbefore stated.

It is now an established fact that the staff of the Commission have repeatedly since the beginning of 1941 sought to prevent the payment of the obligations of the United Gas Corporation to Electric Bond and Share Company, and the said staff of the Commission have improperly predicated their opposition to a misconception of the law and the misuse of established equitable principles and a misconception and misconstruction of the statutory provisions of the Public Utility Holding Company Act of 1935.

At the very outset, this participant as a substantial stockholder of Electric Bond and Share Company knows that his primary fight is with the staff of the

Commission who have arbitrarily and unjustly taken a position against the stockholders of Electric Bond and Share Company which staff position is apparently now joined in by the management of Electric Bond and Share Company. This participant knows that his present difficulties are primarily due to the activities of the staff of the Commission which have now taken root and form the basis of the present plan and amendment to the declaration of the United Gas Corporation.

The release of the Commission (3301) at page 2 thereof refers to the fact that in the early part of 1941 the staff furnished copies of a preliminary staff memorandum entitled 'United Gas Corporation—Loans from Bond and Share' setting forth the staff's tentative thinking on the problems, in order that company officials might be advised of the nature of the inquiry which might be in order.

This preliminary staff memorandum which is now in the record as Okin's Ex. XI, was prepared by Milton Cohen, who was then assigned to the Electric Bond and Share Company matters, and who has for a long time now been the Director of the Public Utility Division of the Commission. The actions of the staff of the Commission in this matter are indicative of the original thoughts of Mr. Cohen as expressed in his said memorandum back in 1940 or 1941, which apparently have continued to exist during the intervening years.

If there is any basis for the stockholders of Electric Bond and Share Company losing approximately the sum of $13,000,000 of their assets, why should they not know in these proceedings what part the staff of the Commission had in the creation of any such loss? Having accomplished their purpose in forcing the management to agree to reduce the claim of Electric Bond and Share Company against United Gas Corporation

by the sum of approximately $13,000,000, what authority exists which purports to shield the members of the staff of the Commission from exposing their part in the creation of so substantial a loss? If the activities of the staff in this matter are justified by law and the facts in this case are beyond approach, why haven't they the courage of their convictions to express openly their part in the concoction of the proposed plan and the so-called settlement? Have the staff of the Commission the right to claim that they are immune from attack directly in these proceedings although they concededly actively in the so-called settlement activities and the creation of the plan?

It is inconceivable that any stronger case could ever be presented to this Commission by an investor to compel the staff of the Commission to openly and frankly state on the record all the facts pertaining to their entire activity in the creation of the proposed plan and alleged settlement.

It seems to this participant that the last place in the world where pertinent and relevent facts should be withheld is within any part of the Commission or its staff, and that the same standards which the Commission compels the public generally to adhere to, namely full disclosure of all pertinent and relevant facts, are just as applicable to the Commission and its staff."

* * * * *

"Upon the hearing various important questions by this participant addressed to declarant officials have been objected to by declarants' counsel and these objections have been sustained and in other instances where objections have been overruled, the witnesses have resorted to prepared similar answers, wholly unresponsive, and motions by this participant to strike the said answers as not responsive have been denied.

The question therefore squarely presented by this motion is whether or not by the rulings of the Trial Examiner, these witnesses are going to be permitted to withhold from the record the facts as to all negotiation and conferences which were climaxed by the filing of the proposed plan and so-called settlement.

One of the issues in this proceeding is whether the proposed plan and settlement is fair to investors. Only persons anxious to withhold facts would have the audacity to contend that in a proceeding such as this, the facts leading up to the creation of the proposed plan and so-called settlement are not material and necessary to a proper determination in this proceeding.

The officials of the declarant corporations have succeeded up to the present time on the record due to the rulings of the Trial Examiner in confining their testimony as to the proposed plan and settlement that the said plan was, in the judgment of the officers and directors of the declarant corporations, fair and equitable to all the persons involved. All efforts of this participant to spread upon the record all the facts which preceded the preparation of the said proposed plan and settlement and which are involved in the preparation of the same, were frustrated by the rulings of the Trial Examiner.

The Trial Examiner apparently subscribing to the thought that in this proceeding all that matters is whether the proposed plan and so-called settlement is fair and equitable to the extent only that one is permitted to ask whether the witness thinks that the plan is fair and equitable, but apparently the Trial Examiner has completely overlooked the facts that whether a plan is fair and equitable is dependent

upon the circumstances under which such plan is created and the manner in which it was brought into existence.

An examination of the record shows that the rulings of the Trial Examiner have succeeded in preventing the witnesses from showing under what circumstances the declarants are claimed to have agreed upon a deduction of $13,000,000, approximately, in the indebtedness due Electric Bond and Share Company and securities owned by it in the United Gas Corp. Is it possible that this Commission has no interest in the manner in which $13,000,000, approximately, in investors money is being dissipated? If the Commission is interested then why should not these witnesses be compelled to state how the figure of approximately $13,000,000 was arrived at? Any person with any degree of sense knows that the figure of $13,000,000 was not taken out of thin air and that there are explanations for the use of this figure. Why should this testimony be absent from the record? It is impossible to conceive a more outrageous situation than that of an investor whose money is being dissipated being told simply that it had been decided to deduct a very substantial sum without the officials being compelled to show how this very substantial figure was arrived at.

It may be that the witnesses when compelled to answer these questions will have to admit that they have no answer and that the sum of $13,000,000 approximately was deducted because the staff of the Commission insisted upon such deduction. If such are the facts why should they be withheld from the record?

Whether a plan is fair is dependent upon the facts and not the conclusions of the officers of the participants to the plan that they believe the plan to be fair.

The stockholders of Electric Bond and Share Company are entitled to know in this proceeding why approximately the sum of $13,000,000 which is the property of said stockholders, is being relinquished by its officers and directors. Up to the present time the record is barren of any legal explanation for any such relinquishment and all efforts of this participant to compel the witnesses to disclose the facts have been frustrated by the rulings of the Trial Examiner."

30. Petitioner received the following letter from Securities and Exchange Commission, with respect to the motion referred to in the preceding paragraph:

SECURITIES AND EXCHANGE COMMISSION
PHILADELPHIA 3

Office of the Secretary

April 13, 1944

Samuel Okin, Esquire,
32 Broadway,
New York, New York.

Re: United Gas Corporation
Electric Bond and Share Company, et al.
(Files 70-314, 70-315, 59-21, 4-33, 54-91, and 70-868)

Dear Sir:

The Commission has considered and declined to pass at this time upon your petition, filed on April 12, 1944, in the proceedings under the Public Utility Holding Company Act of 1935 pending in respect of United Gas Corporation, et al. (Files 70-314, et al.), for reversal of certain rulings on evidence made by the trial examiner, to which you took exception. It

is assumed that you will preserve your exceptions on the record for further consideration by the Commission in accordance with the Rules of Practice.

By direction of the Commission.

ORVAL L. DUBOIS
Secretary

31. During the course of the proceedings petitioner while in the midst of his cross examination of a witness was directed by the Trial Examiner to cease asking the witness any further questions, to which direction petitioner took due exception and refrained from asking any further questions because of inherent threats that he would be excluded from the hearing if petitioner insisted in propounding his questions. Petitioner has made proper application to the Commission to reverse these rulings, and same will be more fully hereinafter referred to.

32. On a Friday afternoon, during the course of the proceedings, and while petitioner was in the midst of his cross examination of another witness, at about 5:30 P. M. the Trial Examiner recessed the hearing for dinner with the direction that the hearing be continued at 8 P. M. that evening. Because of the unusual strain that petitioner's nervous system was subjected to during the course of the said day due to the rulings of the Trial Examiner, as appear more fully in the record, petitioner became seriously ill due to a choking spell caused by the enlargement of the thyroid gland in his throat which made it most imperative that he immediately leave Philadelphia and return to his home in New York City. With great physical difficulty, petitioner succeeded in returning to the hearing room of the Commission at 8 P. M. that evening and stated the facts on the record and petitioner explained to the Trial Examiner that it was physically im-

possible for petitioner to continue his cross examination of the witness and other witnesses that evening due to his sudden illness, as aforesaid, and petitioner requested the Examiner to adjourn the hearing until Tuesday, following, explaining that petitioner would be glad to return on Monday and continue his cross examination, but that petitioner was compelled to be present in the United States Circuit Court of Appeals, Second Circuit, to oppose two motions made by the Securities and Exchange Commission with respect to two petitions filed by petitioner in that Court. Petitioner was asked by the Trial Examiner whether he would be able to return the following day, Saturday, but petitioner answered that he was too ill to return the next day, and was too ill to even wait for the ruling of the Trial Examiner and would have to leave the hearing room before the Trial Examiner made any ruling. On Monday, following, petitioner learned that the Trial Examiner, the preceding Friday, when deponent became suddenly ill as aforesaid, denied deponent's request for an adjournment, and permitted the cross examination of the witness by this petitioner to be terminated in his absence, permitted other witnesses to be examined in petitioner's absence, adjourned the hearing late that evening to the next day, Saturday, when again witnesses were examined and cross examined in petitioner's absence due to his illness. Proper application was made to the Commission with respect to said actions of the Trial Examiner, and further reference is made hereinafter.

33. On or about June 28, 1944, there was served upon petitioner a draft of proposed Findings and Opinion recommended by the Public Utilities Division for adoption by the Commission together with Appendices to said draft. A comparison of said draft of proposed Findings and Opinion recommended by the Public Utilities Divi-

sion and the Appendices thereto, with Release No. 5271 of the Securities and Exchange Commission and Appendices thereto, which constitute the Findings and Opinion of the Commission, and its order dated the 8th day of September, 1944, indicates very clearly that the Findings and Opinion of the Commission in this matter including the Appendices thereto, are substantially the same as that recommended by its Public Utilities Division for adoption, and that the only material change in the proposed Findings and Opinion, pertain to that portion of the proposed Findings and Opinion wherein the Public Utilities Division of the Commission prepared an opinion for the Commission to deny petitioner's motions before it, so that the same was amended in form but continued in substance and conclusion, namely to deny petitioner's motions to set aside the rulings of the Trial Examiner.

34. Petitioner argued at length orally before the Commission in opposition to the proposed transaction wherein Electric Bond and Share Company contemplates selling to Electric Power & Light Corporation for the sum of $44,000,000, assets consisting of claims against the United Gas Corporation having a value of approximately $56,665,000, which said $44,000,000 it is intended shall be received by the Electric Power & Light Corporation from the United Gas Corporation by the latter purchasing from the Electric Power & Light Corporation 440,000 shares of $7 second preferred stock of the United Gas Corporation for the sum of $44,000,000. It is intended that this sum of $44,000,000 shall be part of the proceeds of the sale of the $100,000,000 bond issue by United Gas Corporation. Petitioner objected also to the use of $44,000,000 for the purchase of any such preferred stock. Petitioner further objected to the proposal of Electric

Bond and Share Company that it only use the open market as a place to purchase its preferred stock instead of also including tenders.

On the argument petitioner questioned the jurisdiction of the Securities and Exchange Commission with respect to the proposed plan of United Gas Corporation upon the ground that Section 11(b)(2) of the Public Utility Holding Company Act of 1935 specifically provides that except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company. The United Gas Corporation is not a holding company within the meaning of that term as contained in the Public Utility Holding Company Act of 1935 but is a public-utility company as defined in the said Act. The Electric Power & Light Corporation today owns the controlling voting power of the United Gas Corporation and under the plan as filed with the Commission which was the subject matter of said consolidated proceedings, the Electric Power & Light Corporation, if said plan is consummated, will continue to own the controlling interest in the United Gas Corporation, and as a matter of fact the controlling interest would be even greater than it is today. Obviously then the proposed plan does not contain a single provision respecting distribution of voting power among the security holders other than a provision to increase the voting power of the Electric Power & Light Corporation now in control of the said United Gas Corporation by reason of its large voting power due to the present ownership of large security interests in the said United Gas Corporation. It is obvious from the aforesaid that the plan

therefore does not contain any provisions for the purpose of fairly and equitably distributing power among the security holders of the United Gas Corporation, as such terms were intended by Congress when incorporated in the Public Utility Holding Company Act of 1935. Certainly Section 11(b)(2) of the said Act was not enacted to enable the Securities and Exchange Commission to approve any plan which increased the voting power of a holding company. Since Section 11(e) of the said Act provides that a plan may be filed by a registered holding company or its subsidiary for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b), and since the proposed plan does not come within any of the said provisions of said Section 11(e), in petitioner's opinion, petitioner is of the belief that the Securities and Exchange Commission had and has no jurisdiction with respect to the said plan of United Gas Corporation.

Section 26 of the Public Utility Holding Company Act of 1935 provides that nothing in said Act shall be construed to affect the validity of any loan or extension of credit made prior or subsequent to the enactment of the Act subject to the condition therein stated. Said section 26 further provides that nothing in the said Act shall be construed to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation or lien, subject to the conditions therein stated. It is petitioner's opinion that by reason of said Section 26, the Securities and Exchange Commission has no jurisdiction whatsoever with respect to the indebtedness of the United Gas Corporation to the Electric Bond and Share Company in the

sum of $56,665,000 and that the activities of the Securities and Exchange Commission and its staff in any way, shape or manner preventing the payment of the said obligations is in direct violation of the Public Utility Holding Company Act of 1935 and its expressed intent and purpose and in direct violation of the constitutional rights of this petitioner.

35. Petitioner submitted a lengthy brief in further support of his objections to the proposed plan, supplementing his oral argument.

36. On the 7th day of September, 1944, the Securities and Exchange Commission issued its findings and opinion (Release No. 5271) and its order dated the 7th day of September, 1944, which said order contained the following:

> IT IS ORDERED that the Plan be, and the same hereby is approved subject, however, to the condition that the applicants undertake to pay such fees and reimburse such expenses incurred or to be incurred in connection with said Plan, the transactions incident thereto and the consummation thereof, as are approved, allocated, or awarded by further order or orders of this Commission; and to the further conditions and reservations hereinafter set forth.
>
> IT IS FURTHER ORDERED that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the provisions of sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the Plan.
>
> IT IS FURTHER ORDERED that this order shall not be operative to authorize the consummation of any

transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved.

IT IS FURTHER ORDERED that the declaration of Bond and Share under Section 12(c) with respect to the acquisition of a portion of its outstanding $5 and $6 preferred stocks be, and the same hereby is, permitted to become effective forthwith subject to the terms and conditions prescribed in Rule U-24 and to the further terms and conditions that:

(1) All purchases shall be effected on the New York Curb Exchange except that the company may purchase large blocks of stock otherwise on said Exchange provided that notice of intention to effect each such purchase together with a statement of the identity of the seller, the price proposed to be paid, and any fees or commissions to be incurred in connection therewith shall have been given to the Commission and the company shall not have been informed by the Commission that it intends to issue an order to show cause why such purchase should not be consummated. The company shall not solicit or cause to be solicited the sale of any shares to the company either on or off the said Exchange;

(2) The company shall furnish to the Commission promptly at the end of each week a report showing the number of shares of each class of preferred stock purchased each day during the week, the prices at which they were purchased and the names of the brokers through whom they were purhased;

(3) The company shall include in its quarterly reports to stockholders information as to the total

number of shares of each class purchased and the aggregate purchase price for each class;

(4) No purchases shall be made after twelve months from the date of the receipt of the cash under the Plan subject, however, to the right of the company to apply for an extension or extensions of such period;

(5) The company shall advise by letter the holders of record of its preferred stock fully with respect to its intention to make such purchases and the method to be employed and the Commission reserves jurisdiction with respect to the form and contents of such notice and any similar communications;

(6) All shares of preferred stock acquired by the Company pursuant to the present declaration and order shall be retired and cancelled;

(7) The company shall have the right to file substitute or additional programs with respect to the use of all or any portion of the funds which are the subject of the application, and jurisdiction is hereby reserved to require the company to make such filings or to take such other action as may be necessary or appropriate the provisions of the Act; and

(8) The Commission reserves jurisdiction in its discretion to rescind or modify its order, any such rescission or modification to be applicable to such portion of the cash permitted to be employed for such purchases pursuant to the proposals herein as shall not have been previously expended.

IT IS FURTHER ORDERED that the joint application and declaration of United and United Gas Pipe Line Company, as amended, with respect to the issuance

of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds, under Sections 6, 7, 9(a), 10, 11(b), and 12 of the Act be, and the same hereby is, granted and permitted to become effective, except as to the issues concerning the terms and conditions of the bonds proposed to be issued and sold by United and United Gas Pipe Line Company and the fees and expenses to be incurred in connection with said proposed issuance and sale as to which matters jurisdiction be, and the same hereby is, specifically reserved, subject, however, to the terms and conditions contained in Rule U-24.

IT IS FURTHER ORDERED that jurisdiction be, and it hereby is reserved:

(1) To consider, determine and take appropriate action with respect to all issues involved in United Gas Corporation, et al., File Nos. 70-314, 70-315, 59-21 and 4-33, except those disposed of herein;

(2) To entertain such further proceedings, to make such further and supplemental findings and to take such additional action as may be found to be appropriate in the premises in connection with the said Plan and the several transactions incident to the consummation thereof;

IT IS FURTHER ORDERED that the issues, distributions, transfers, and exchanges of securities, and the transactions, specified and itemized below all as provided by the Plan are necessary or appropriate to the integration and simplification of the holding company system of which United is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Public Utility Holding Company Act of 1935:

(1) The sale and transfer by Bond and Share and the acquisition by Electric for a cash purchase price of $44,000,000 of all the claims in and against United held by Bond and Share as follows: $25,000,000 principal amount of 6% debentures due 1953 of United Gas Public Service Company assumed by United; 6% demand note in the principal amount of $25,925,000; 6% open account of indebtedness of $2,000,000; 17,310 shares of $7 preferred stock, 752,666 shares of common stock, 151,005 option warrants for the purchase of common stock of United; and $440,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company assumed by United.

(2) The surrender by Electric and the acquisition and cancellation by United of 17,310 shares of $7 preferred stock of United together with all rights to accumulated and undeclared dividends thereon acquired by Electric from Bond and Share in the transaction described in paragraph (1) above.

(3) The redemption and cancellation by United of 432,512 shares of its $7 preferred stock at their redemption price of 110 per share plus accumulated dividends thereon to the redemption date.

(4) The declaration, issuance and distribution by United of a dividend on its $7 second preferred stock, all of which is held by Electric, of 12,385,520 shares of its $1 par value common stock and the acceptance by Electric of such stock dividend in payment of $12,385,520 of accumulated and unpaid dividends on such stock.

(5) The surrender by Electric and the acquisition and cancellation by United of 440,680 shares of $7

second preferred stock of United together with all rights to accumulated and undeclared dividends thereon and the issuance and delivery to Electric in exchange therefor of 44,468,000 shares of the $1 par value common stock of United.

(6) The sale and transfer by Electric and the acquisition for cancellation by United in exchange for $44,000,000 in cash of 440,000 shares of second preferred stock of United having a stated value of $44,000,000 and together with the right to accumulated and unpaid dividends on such stock.

(7) The payment by Electric of the $44,000,000 received by it in the transactions described in paragraph (6) above to Bond and Share.

(8) The surrender by Electric and the acquisition by United as a contribution to capital of the securities and open account of indebtedness of United acquired by Electric from Bond and Share as described in paragraph (1) above together with option warrants for the purchase of 3,600,040 shares of common stock of United held by Electric exclusive of the 17,310 shares of $7 preferred stock of United previously surrendered as described in paragraph (2), above.

(9) The redemption and retirement by United of $3,460,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company due March 1, 1952 assumed by United.

(10) The issuance and distribution by United of 42,613,209 shares of its $1 par value common stock as a common stock dividend of two-thirds of a share of $1 par value common stock on each share of such stock outstanding and the acceptance thereof by the common stockholders of United, and in connection

therewith the transfer from capital surplus to stated capital of the sum of $42,613,209 to cover the capital liability to be represented by the additional shares of stock to be issued and to render such shares fully paid and nonassessable.

(11) The issuance and distrbution by United of 10,653,302.2 shares of $10 par value common stock and the transfer and exchange of such shares by United and its common stockholders for the outstanding 106,533,022 shares of $1 par value common stock of United or in exchange for scrip of United.

(12) The issuance, transfer and exchange of scrip of United and the issuance and transfer of $10 par value stock of said company in exchange therefor to the extent necessary to carry out the plan.

(13) All other transfers and exchanges of common stock and scrip of United which are required in order to carry out the Plan.

(14) The revocation, abrogation and cancellation of all outstanding option warrants for the purchase of common stock of United.

(15) The issuance and sale by United of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds, and the issuance by United Gas Pipe Line Company of $23,000,000 principal amount of its First Mortgage Bonds, subject to the reservations and conditions hereinbefore set forth.

37. It is petitioner's opinion that the said order dated the 7th day of September, 1944, which this petitioner seeks a review of, is detrimental to the interests of the stockholders of the Electric Bond and Share Company, that the Securities and Exchange Commission has no

statutory authority to make said order and that said order is violative of the provisions of the Public Utility Holding Company Act of 1935 and its expressed intent and purport; that the Electric Bond and Share Company, without the consent of the holders of two-thirds of its outstanding stock entitled to vote thereon obtained at a meeting of the stockholders of that company called pursuant to Section 45 of the Stock Corporation Law of the State of New York, has no power or authority to sell the claims against and the securities of the United Gas Corporation having a value of approximately $56,665,000 to the Electric Power & Light Corporation for the sum of $44,000,000, and that any such sale without such consent is void and in violation of Section 20 of the Stock Corporation Law of the State of New York; that the Electric Bond and Share Company has no power to consent to the various other transactions proposed in the said plan including the purchase by United Gas Corporation of $44,000,000 in second preferred stock of the United Gas Corporation with the proceeds of the proposed bond issue by that corporation, to that extent, and to pay that amount to Electric Power & Light Corporation, such purchase constituting a subordination of the claims of Electric Bond and Share Company to that of the Second Preferred Stock so to be purchased; that Electric Bond and Share Company has no authority to consent to the other proposed transactions which are detrimental to the interests of the Electric Bond and Share Company and its stockholders; that the Securities and Exchange Commission has no authority to approve the proposed transactions and to approve the proposed plan and the approval of the proposed transactions and the approval of the plan is in violation of the Public Utility Holding Company Act of 1935 and its expressed intent and purpose; that the Securities and Exchange Commission has no power or authority to inter-

fere with the payment to the Electric Bond and Share Company by the United Gas Corporation of the full amount of approximately $56,665,000 owing by it to the Electric Bond and Share Company and the collection by the said Electric Bond and Share Company when due of the full amount of approximately the sum of $56,665,000 from the United Gas Corporation and the Electric Bond and Share Company is entitled to retain its stock interests in the United Gas Corporation if said corporation decides to only pay its outstanding debts to the Electric Bond and Share Company in the sum of $53,365,000; and under those circumstances the Electric Bond and Share Company is not to be discriminated against and the Securities and Exchange Commission has no power or authority to direct that the similar securities held by the public in the United Gas Corporation shall be preferred over the securities of the United Gas Corporation owned by the Electric Bond and Share Company.

38. Upon information and belief that the Electric Power & Light Corporation dominates and controls the United Gas Corporation and that Electric Bond and Share Company dominates anad controls the Electric Power & Light Corporation.

39. Upon information and belief that the officers and directors of the Electric Bond and Share Company authorized the joining by the Electric Bond and Share Company in the filing of the said plan of the United Gas Corporation and that any demand by the petitioner upon the said Electric Bond and Share Company and its directors, to seek review of the said order of the Securities and Exchange Commission, under the circumstances, would be futile.

40. Petitioner further states that it is his opinion that the order of the Securities and Exchange Commission

dated the 7th day of September, 1944, deprives petitioner of his property without due process of law and in violation of the Constitution of the United States.

41. It is petitioner's further opinion that the Securities and Exchange Commission has no power or statutory authority to in any way, shape or manner interfere with the purchase by the Electric Bond and Share Company of its own preferred stock with its own cash or other assets, or to order the cancellation and retirement of any such preferred stock purchased, or to direct that any particular plan be adopted for the elimination of such stock, and that the Electric Bond and Share Company has the legal right to purchase its own preferred stock with its own assets in accordance with the laws of the State of New York under which said corporation was organized without any interference whatsoever from the Securities and Exchange Commission or its staff.

WHEREFORE, petitioner respectfully prays this Circuit Court of Appeals, in and for the Second Circuit, to review the said order of the Securities and Exchange Commission dated the 7th day of September, 1944, hereinbefore more fully referred to, pursuant to the authority vested in the said Circuit Court by Section 24(a) of the Public Utility Holding Company Act of 1935, and that upon said review said order, and each and every part thereof, pertaining to Electric Bond and Share Company, Electric Power & Light Corporation, United Gas Corporation and United Gas Pipe Line Company, be set aside, as without authority in law and contrary to law, and contrary to the provisions of the Public Utility Holding Company Act of 1935, and its expressed intent and purpose, and the Stock Corporation Law of the State of New York; and upon the ground that the Securities and Ex-

change Commission had no power or authority to make said order, and upon the ground that the said order is detrimental to the interests of the Electric Bond and Share Company and its stockholders; and upon the further grounds that the said order of the Securities and Exchange Commission violates the constitutional rights of the said Electric Bond and Share Company and its stockholders, and the petitioner is being deprived of his property without due process of law in violation of the Constitution of the United States; and petitioner further prays that this Circuit Court make an order granting leave to this petitioner to adduce the additional evidence which he sought to adduce upon the hearing but was prevented by the rulings of the Trial Examiner as sustained by the order of the Commission and directing that such additional evidence, which is material and necessary, be taken before the Commission and adduced as provided in said Section 24(a) of the Public Utility Holding Company Act of 1935; and petitioner further prays for such other and further relief in the premises as to the Court may seem just and proper under the provisions of Section 24(a) of the Public Utility Holding Company Act of 1935.

Dated, New York, September 20, 1944.

SAMUEL OKIN,
Petitioner.

(Duly verified.)

Notice of Motion to Dismiss Petition for Review.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19496

[TITLE OMITTED]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Morton E. Yohalem, the undersigned will move this Court at a term thereof to be held on October 2, 1944, at the opening of Court in the forenoon of that day, or as soon thereafter as counsel can be heard, at the Federal Court House, Foley Square, New York City, New York, for an order dismissing the Petition to Review an order of the Securities and Exchange Commission issued on September 7, 1944 approving a plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, filed by United Gas Corporation and joined in by Electric Power & Light Corporation and Electric Bond and Share Company, and permitting certain declarations to become effective and granting certain applications, and for such further relief as may be appropriate.

Dated: Philadelphia, Pa., September 27, 1944.

ROGER S. FOSTER, Solicitor,
Securities and Exchange Commission.

MORTON E. YOHALEM, Counsel,
Public Utilities Division
Counsel for the Securities and
Exchange Commission,
18th and Locust Streets,
Philadelphia, Pennsylvania.

Notice of Motion to Dismiss Petition for Review.

To:

SAMUEL OKIN, Esq.,
32 Broadway,
New York, N. Y.

REID & PRIEST, Esqs., and
GEORGE T. NAFF, Esq.,
Attorneys for United Gas Corporation, et al.,
2 Rector Street,
New York City, N. Y.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL, Esqs.,
Attorneys for Electric Power & Light Corporation,
63 Wall Street,
New York City, N. Y.

SIMPSON, THACHER & BARTLETT,
Attorneys for Electric Bond and Share Company,
120 Broadway,
New York City, N. Y.

Affidavit of Morton E. Yohalem in Support of Motion to Dismiss.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No.

[TITLE OMITTED]

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.

MORTON E. YOHALEM being duly sworn deposes and says:

1. Deponent is Counsel to the Public Utilities Division of the Securities and Exchange Commission (Commission), and is familiar with the facts and circumstances of this case.

2. This affidavit is submitted in support of the motion of the Commission, to dismiss the Petition to Review the order of the Commission dated September 7, 1944 (Holding Company Act Release No. 5271) approving a plan pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 (Act), filed by United Gas Corporation and joined in by Electric Power & Light Corporation and Electric Bond and Share Company, and permitting certain declarations to become effective, and granting applications.

3. The primary basis of said motion is that the order will not become effective to authorize any action whatsoever until after further proceedings in the United States District Court for the District of Delaware, pursuant to the

provisions of Section 11(e) of the Act which provides in pertinent part:

> "If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *"

Application to enforce and carry out said plan was made by the Commission prior to the filing of the petitions for review herein, in accordance with the foregoing provision of the Act. It is the Commission's position that the provisions for judicial examination of the merits of such plan in the enforcement proceedings, and for appeal from any order of the District Court under Section 225 of the Judicial Code, are here applicable to the exclusion of the procedure specified in Section 24(a) as generally applicable for the review of any orders of the Commission. It is further urged that petitioner is not aggrieved by the order of the Commission.

4. Annexed hereto as "Appendix A", and made a part hereof as if fully set forth herein, is a copy of the Plan of

Reorganization under Section 11(e) of the Act, as filed by United Gas Corporation and joined in by Electric Power & Light Corporation and Electric Bond and Share Company, and as approved by the Commission. On page 10 of said "Exhibit A" and under the portion designated "Part V—Conditions and Reservations" appears the following:

"The effectuation of the Plan is subject to the following conditions and reservations:

"A. The Plan shall have been found by the Commission to be necessary to effectuate the provisions of subsection (b) of Section 11 of the Act and to be fair and equitable to the persons affected thereby, and each step in the carrying out and consummation of the Plan shall have been approved by order of the Commission.

"B. The Commission shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a final decree or order finding the Plan to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act, and such court shall have taken action to enforce and carry out the terms and provisions of the Plan.

"C. The Securities and Exchange Commission and the court referred to above in paragraph B shall have taken action to render effective the settlement and discharge of the various claims and counterclaims in accordance with Part III.

"D. The Securities and Exchange Commission and the court referred to above in paragraph B shall have taken action effectively cancelling the option warrants for the purchase of Common Stock of United, which are outstanding in the hands of Bond and Share, Electric and the public."

5. Annexed hereto as "Appendix B", and made a part hereof as if fully set forth herein, is a copy of the Findings, Opinion and Order of the Commission, dated September 7, 1944 (Holding Company Act Release No. 5271) approving the plan annexed hereto as "Exhibit A" and referred to above, which order is the subject of the present Petition for Review. On page 41 of said "Exhibit B", constituting the third page of said Order as the second, third and fourth full paragraphs on said page appears the following:

> "IT IS ORDERED that the Plan be, and the same hereby is approved subject, however, to the condition that the applicants undertake to pay such fees and reimburse such expenses incurred or to be incurred in connection with said Plan, the transactions incident thereto and the consummation thereof, as are approved, allocated, or awarded by further order or orders of this Commission; and to the further conditions and reservations hereinafter set forth.
>
> "IT IS FURTHER ORDERED that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the provisions of sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the Plan.
>
> "IT IS FURTHER ORDERED that this Order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved."

6. Annexed hereto as "Exhibit C" and made a part hereof as if fully set forth herein, is a copy of the applica-

tion of the Commission, signed by deponent as attorney for said Commission to the United States District Court for the District of Delaware, to enforce the plan annexed hereto as "Exhibit A" and referred to above.

7. Annexed hereto as "Exhibit D" and made a part hereof as if fully set forth herein, is the order of Honorable Paul Leahy, United States District Judge for the District of Delaware, of September 8, 1944, directing that a hearing be held before him on September 29, 1944 at 10:30 a. m.

> "• • • for the purpose of determining whether the plan dated March 1, 1944 proposed by United Gas Corporation, Electric Bond and Share Company and Electric Power & Light Corporation pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 is fair and equitable and appropriate to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935, and whether the Court should enforce and carry out the terms and provisions of the plan and for such other purposes as may appear necessary or appropriate in the premises;"

8. To the best of deponent's knowledge and belief the documents set forth as Exhibits "A", "B", "C" and "D" are true and correct copies of the documents of which they purport to be copies as set forth above herein.

MORTON E. YOHALEM.

Sworn to before me this 27th day of September, 1944.
Notary Public.
My commission expires Mar. 7, 1947.

Part of Exhibit B.

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 7th day of September, A. D., 1944.

In the Matter of

UNITED GAS CORPORATION
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY

File No. 70-314

In the Matter of

ELECTRIC BOND AND SHARE COMPANY

File No. 70-315

In the Matter of

ELECTRIC BOND AND SHARE COMPANY
ELECTRIC POWER & LIGHT CORPORATION
UNITED GAS CORPORATION
HOUSTON GAS SECURITIES COMPANY
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY

File No. 59-21

(Public Utility Holding Company Act of 1935 Sections 11(b)(2), 12(b), 12(c) and 12(f))

In the Matter of

INVESTIGATION OF ORGANIZATION AND FINANCING OF UNITED GAS CORPORATION., ETC.

File No. 4-33

(Public Utility Holding Company Act of 1935 Sections 18(a) and 18(b))

ORDER APPROVING PLAN PURSUANT TO SECTION 11(e) PERMITTING DECLARATIONS TO BECOME EFFECTIVE AND GRANTING APPLICATIONS

Part of Exhibit B.

In the Matter of

UNITED GAS CORPORATION
ELECTRIC POWER & LIGHT CORPORATION
ELECTRIC BOND AND SHARE COMPANY

File No. 54-91

In the Matter of

ELECTRIC BOND AND SHARE COMPANY

File No. 70-868

(Public Utility Holding Company Act of 1935)

United Gas Corporation ("United") having filed with the Commission an application for approval of a Plan, as amended (hereinafter referred to as the "Plan"), pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 (the "Act") and Electric Bond and Share Company ("Bond and Share") and Electric Power & Light Corporation ("Electric") having joined in said Plan with respect to all transactions affecting them provided for therein; and

United, Bond and Share and Electric having requested the Commission pursuant to Section 11(e) of the Act, if it approved the Plan, to apply to a Court in accordance with the provisions of sub-section (f) of Section 18 of the Act to enforce and cary out the terms and provisions of said Plan; and

Bond and Share having filed a declaration under Section 12(c) of the Act seeking approval of the use of all or any part of the cash proceds to be received by it under the Plan for the acquisition and retirement of its preferred stocks

and having conditioned its joinder in the Plan upon the issuance of an order of the Commission permitting said declaration under Section 12(c) to become effective; and

United and certain of its subsidiaries having filed a joint application and declaration pursuant to Sections 6, 7, 9(a), 10 and 12 of the Act for approval of a series of transactions incident to the refinancing of United (File No. 70-314), and in connection with the filing of said Plan having filed an amendment to the joint application and declaration to provide for the issuance and sale of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds and the use of the proceeds of such sale for the redemption of its publicly held $7 preferred stock, the purchase of a portion of its outstanding second preferred stock and the redemption of the publicly held 5% Collateral Trust Gold Bonds assumed by United, as contemplated in said Plan and for the issuance and sale by United Gas Pipe Line Company, a wholly-owned subsidiary of United, of $23,000,000 principal amount of its First Mortgage Bonds, all of which will be issued to United in exchange for a like principal amount of United Gas Pipe Line's 6% Debentures owned by United which debentures will be cancelled; and

The Commission having on March 6, 1944 issued its Notice and Order for Hearing on said application and Plan under Section 11(e) on said declaration under Section 12(c) and having directed the consolidation of the proceedings thereon with each other and with a prior consolidated proceeding involving, among other matters, applications and declarations under Sections 6, 7, 9(a), 10 and 12 of the Act for the refinancing of United and proceedings instituted by the Commission under Sections 11(b)(2), 12(b), 12(c), 12(f), 18(a) and 18(b) of the Act (File Nos. 70-314, 70-315, 59-21, 4-33); and

A copy of said Notice and Order for Hearing on March 6th, 1944 having been mailed to all security holders of the

applicant (insofar as the identity of such security holders was known or available), notice having been duly given to all interested persons, all persons having been given an opportunity to be heard with respect to all matters pertaining to said proceedings, public hearings having been held, the staff of the Public Utilities Division of the Commission having prepared and filed a draft of the proposed Findings and Opinion and having recommended its adoption by the Commission, copies of the draft of the proposed Findings and Opinion having been served on all parties and persons who appeared and participated in the proceedings, an opportunity having been afforded to each of them to file a written statement of objections to all or any part thereof, briefs and answering briefs having been filed and the Commission having heard oral argument, and the Commission having this day issued and filed its Findings and Opinion herein; and

United, Bond and Share and Electric having requested that the Commission's order conform to and set forth the recitals specified in Sections 371 and 1808(f) of the Internal Revenue Code as amended;

IT IS ORDERED that the Plan be, and the same hereby is approved subject, however, to the condition that the applicants undertake to pay such fees and reimburse such expenses incurred or to be incurred in connection with said Plan, the transactions incident thereto and the consummation thereof, as are approved, allocated, or awarded by further order or orders of this Commission; and to the further conditions and reservations hereinafter set forth.

IT IS FURTHER ORDERED that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the

provisions of sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the Plan.

IT IS FURTHER ORDERED that this order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved.

IT IS FURTHER ORDERED that the declaration of Bond and Share under Section 12(c) with respect to the acquisition of a portion of its outstanding $5 and $6 preferred stocks be, and the same hereby is, permitted to become effective forthwith subject to the terms and conditions prescribed in Rule U-24 and to the further terms and conditions that:

(1) All purchases shall be effected on the New York Curb Exchange except that the company may purchase large blocks of stock otherwise than on said Exchange provided that notice of intention to effect each such purchase together with a statement of the identity of the seller, the price proposed to be paid and any fees or commissions to be incurred in connection therewith shall have been given to the Commission and the company shall not have been informed by the Commission that it intends to issue an order to show cause why such purchase should not be consummated. The company shall not solicit or cause to be solicited the sale of any shares to the company either on or off the said Exchange;

(2) The company shall furnish to the Commission promptly at the end of each week a report showing the number of shares of each class of preferred stock purchased each day during the week, the prices at which they were purchased and the names of the brokers through whom they were purchased;

(3) The company shall include in its quarterly reports to stockholders information as to the total number of shares of each class purchased and the aggregate purchase price for each class;

(4) No purchase shall be made after twelve months from the date of the receipt of the cash under the Plan subject, however, to the right of the company to apply for an extension or extensions of such period;

(5) The company shall advise by letter the holders of record of its preferred stock fully with respect to its intention to make such purchases and the method to be employed and the Commission reserves jurisdiction with respect to the form and contents of such notice and any similar communications;

(6) All shares of preferred stock acquired by the Company pursuant to the present declaration and order shall be retired and cancelled;

(7) The company shall have the right to file substitute or additional programs with respect to the use of all or any portion of the funds which are the subject of the application, and jurisdiction is hereby reserved to require the company to make such filings or to take such other action as may be necessary or appropriate under the provisions of the Act; and

(8) The Commission reserves jurisdiction in its discretion to rescind or modify its order, any such rescission or modification to be applicable to such portion of the cash permitted to be employed for such purchases pursuant to the proposals herein as shall not have been previously expended.

IT IS FURTHER ORDERED that the joint application and declaration of United and the United Gas Pipe Line Company, as amended, with respect to the issuance of $100,000,000

principal amount of First Mortgage and Collateral Trust Bonds, under Sections 6, 7, 9(a), 10, 11(b), and 12 of the Act be, and the same hereby is, granted and permitted to become effective, except as to the issues concerning the terms and conditions of the Bonds proposed to be issued and sold by United and United Gas Pipe Line Company and the fees and expenses to be incurred in connection with said proposed issuance and sale as to which matters jurisdiction be, and the same hereby is, specifically reserved, subject, however, to the terms and conditions contained in Rule U-24.

IT IS FURTHER ORDERED that jurisdiction be, and it hereby is, reserved:

(1) To consider, determine and take appropriate action with respect to all issues involved in United Gas Corporation, et al., File Nos. 70-314, 70-315, 59-21 and 4-33, except those disposed of herein;

(2) To entertain such further proceedings, to make such further and supplemental findings and to take such additional action as may be found to be appropriate in the premises in connection with the said Plan and the several transactions incident to the consummation thereof:

IT IS FURTHER ORDERED that the issues, distributions, transfers, and exchanges of securities, and the transactions, specified and itemized below all as provided by the Plan are necessary or appropriate to the integration and simplification of the holding company system of which United is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Public Utility Holding Company Act of 1935:

(1) The sale and transfer by Bond and Share and the acquisition by Electric for a cash purchase price of $44,000,000 of all the claims in and against United held by Bond

and Share as follows: $25,000,000 principal amount of 6% Debentures due 1953 of United Gas Public Service Company assumed by United; 6% demand note in the principal amount of $25,925,000; 6% open account of indebtedness of $2,000,000; 17,310 shares of $7 preferred stock, 752,666 shares of common stock, 151,005 option warrants for the purchase of common stock of United; and $440,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company assumed by United.

(2) The surrender by Electric and the acquisition and cancellation by United of 17,310 shares of $7 preferred stock of United together with all rights to accumulated and undeclared dividends thereon acquired by Electric from Bond and Share in the transaction described in paragraph (1) above.

(3) The redemption and cancellation by United of 432,512 shares of its $7 preferred stock at their redemption price of $110 per share plus accumulated dividends thereon to the redemption date.

(4) The declaration, issuance and distribution by United of a dividend on its $7 second preferred stock, all of which is held by Electric, of 12,385,520 shares of its $1 par value common stock and the acceptance by Electric of such stock dividend in payment of $12,385,520 of accumulated and unpaid dividends on such stock.

(5) The surrender by Electric and the acquisition and cancellation by United of 444,680 shares of $7 second preferred stock of United together with all rights to accumulated and undeclared dividends thereon and the issuance and delivery to Electric in exchange therefor of 44,468,000 shares of the $1 par value common stock of United.

(6) The sale and transfer by Electric and the acquisition for cancellation by United in exchange for $44,000,000 in

cash of 440,000 shares of second preferred stock of United having a stated value of $44,000,000 and together with the right to accumulated and unpaid dividends on such stock.

(7) The payment by Electric of the $44,000,000 received by it in the transaction described in paragraph (6) above to Bond and Share.

(8) The surrender by Electric and the acquisition by United as a contribution to capital of the securities and open account of indebtedness of United acquired by Electric from Bond and Share as described in paragraph (1) above together with option warrants for the purchase of 3,600,040 shares of common stock of United held by Electric exclusive of the 17,310 shares of $7 perferred stock of United previously surrendered as described in paragraph (2) above.

(9) The redemption and retirement by United of $3,460,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company due March 1, 1952 assumed by United.

(10) The issuance and distribution by United of 42,613,209 shares of its $1 par value common stock as a common stock dividend of two-thirds of a share of $1 par value common stock on each share of such stock outstanding and the acceptance thereof by the common stockholders of United, and in connection therewith the transfer from capital surplus to stated capital of the sum of $42,613,209 to cover the capital liability to be represented by the additional shares of stock to be issued and to render such shares fully paid and non-assessable.

(11) The issuance and distribution by United of 10,653,302.2 shares of $10 par value common stock and the transfer and exchange of such shares by United and its common stockholders for the outstanding 106,533,022 shares of $1

par value common stock of United or in exchange for scrip of United.

(12) The issuance, transfer and exchange of scrip of United and the issuance and transfer of $10 par value common stock of said company in exchange therefor to the extent necessary to carry out the plan.

(13) All other transfers and exchanges of common stock and scrip of United which are required in order to carry out the Plan.

(14) The revocation, abrogation and cancellation of all outstanding option warrants for the purchase of common stock of United.

(15) The issuance and sale by United of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds, and the issuance by United Gas Pipe Line Company of $23,000,000 principal amount of its First Mortgage Bonds, subject to the reservations and conditions hereinbefore set forth.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Exhibit C.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER OF UNITED GAS CORPORATION, ELECTRIC BOND AND SHARE COMPANY *and* ELECTRIC POWER & LIGHT CORPORATION	A Proceeding to Enforce a Plan Pursuant to Section 11(e) and 18(f) of the Public Utility Holding Company Act of 1935. Civil Action 471.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

The Securities and Exchange Commission, by its attorney, respectfully states:

(1) The applicant, Securities and Exchange Commission (hereinafter sometimes referred to as the "Commission") is an agency and instrumentality of the United States created by and organized pursuant to Section 4 of the Securities Exchange Act of 1934, being Title I of an Act of Congress approved June 6, 1934, 48 Stat. 885, 15 U. S. C. Sec. 73(d).

(2) This application is made pursuant to the authority vested in the Commission and the jurisdiction vested in this Court by Sections 11(e), 18(f) and 25 of the Public Utility Holding Company Act of 1935 (hereinafter sometimes referred to as the "Act"), being Title I of an Act of Congress approved August 26, 1935, 49 Stat. 803, 15 U. S. C. Sec. 79(a), *et seq.*

Exhibit C.

(3) United Gas Corporation (hereinafter sometimes referred to as "United") is a corporation organized under the laws of the State of Delaware, and is a public utility company within the meaning of Section 2(a)(5) of the Act. Electric Bond and Share Company (hereinafter sometimes referred to as "Bond and Share") is a corporation organized under the laws of the State of New York and is a holding company within the meaning of Section 2(a)(7) of the Act. Electric Power & Light Corporation (hereinafter sometimes referred to as "Electric") is a corporation organized under the laws of the State of Maine and is a holding company within the meaning of Section 2(a)(7) of the Act. Bond and Share and Electric have filed notifications of registration under Section 5(a) of the Act and are registered holding companies under the Act. United is a subsidiary of Electric, which in turn is a subsidiary of Bond and Share within the meaning of Section 2(a)(8) of the Act.

(4) On March 6, 1944, United filed an application with the Commission for approval of a plan dated March 1, 1944, under Section 11(e) of the Act and Bond and Share and Electric joined in said plan with respect to all transactions therein affecting them. The joinder of Bond and Share in said plan was conditioned upon permission being granted to it to employ the $44,000,000 to be received by it under the plan in the acquisition of its preferred stock. Pursuant to order of the Commission public hearings were held thereon. On June 14, 1944, a joint supplemental application dated as of June 13, 1944 was filed with the Commission.

(5) On March 6, 1944, the Commission entered an order for hearing on the plan which required that notice of such hearing be given to all security holders of United,

Electric and Bond and Share (insofar as the identity of such security holders is known or available to them) by mailing to each of said persons a copy of the order for hearing at his last-known address at least 20 days prior to the date of hearing. Notice of said hearing was also published in the Federal Register, was published by the Commission as Holding Company Act Release No. 4926 (a copy of which is attached hereto and marked "Exhibit A"), was mailed to all persons on the Commission's mailing list for releases under the Act, and was released to the press. The requirements of the Commission's order as to the giving of said notice to such persons were complied with.

(6) The plan provides in substance for the elimination from the security structure of United of its entire existing debt, preferred stock, second preferred stock and accumulated dividend arrearages on the preferred and second preferred stocks and the issuance of $100,000,000 of First Mortgage Debt as the sole senior security in the structure of United; the elimination of the presently outstanding common stock of United having a par value of $1 per share and the issuance of 10,633,302.2 shares of common stock having a par value of $10 and the cancellation of the outstanding option warrants.

(7) As a result of the action contemplated in and proposed by the plan, Bond and Share would be divested of all its claims against and interest in United including its debt claims and holdings of preferred stock with accumulated arrearages thereon, common stock and option warrants and would receive cash in the amount of $44,000,000. Electric would be divested of all of the $7 second preferred stock of United, the entire issue of

which is owned by it, plus accumulated dividend arrearages thereon as well as its present common stockholdings and option warrants and would receive 10,108,101 shares of new $10 par value common stock. The public holders of common stock in lieu of their 3,271,207 shares of present common stock of an aggregate par value of $3,271,207 would receive 545,201.2 shares of new common stock of an aggregate par value of $5,452,012. The publicly-held $7 preferred stock would be redeemed at the redemption price of $110 per share plus accumulated and unpaid dividends and the option warrants would not participate in the plan and would be cancelled.

(8) Pursuant to the Commission's order dated March 6, 1944 ("Exhibit A"), public hearings were held on the plan at which certain holders of common stock of United and common and preferred stocks of Bond and Share and Electric appeared and participated. Thereafter, the staff of the Public Utilities Division of the Commission prepared and filed a draft of Proposed Findings and Opinion and recommended its adoption by the Commission. Copies of the draft of the Proposed Findings and Opinion were served on all parties and persons who appeared and participated in the proceedings. An opportunity was afforded to each of them to file a written statement of objections to all or any part thereof. Briefs and answering briefs were filed and the Commission heard oral argument. On September 7, 1944, the Commission entered its Findings and Order (a copy of which is attached hereto and marked "Exhibit B") approving the plan, and granting the request of the applicants pursuant to Section 11(e) of the Act, and permitting Bond and Share to employ the $44,000,000 to be received by it under the plan in the acquisition of its preferred stock.

Exhibit C.

(9) The Commission makes this application to the Court to enforce and carry out the plan at the request of United, Electric and Bond and Share. A copy of the plan is attached hereto and marked "Exhibit C".

(10) Numerous actions were commenced in the Supreme Court of the State of New York and in United States Federal Courts by stockholders of United and Electric, raising some of the same issues which were being investigated by the staff of the Commission and which were the subject of the proceedings before the Commission instituted on May 31, 1941. These actions in the Courts are as follows:

Title of Action	*Court*	*Plaintiff*
William Weinberger, et al., Plaintiffs, v. Serge Semenenko, et al., Defendants	Supreme Court of the State of New York, New York County	Common Stockholder of United
Louis Levy, Plaintiff, v. Earle Bailie, et al., Defendants	Supreme Court of the State of New York, Kings County	Common Stockholder of United
Philip Steiger, Plaintiff, v. Margaret Henderson Bailee, et al., Defendants	Supreme Court of the State of New York, New York County	Common Stockholder of United
Jack Levine, Plaintiff, v. Earle Bailie, et al., Defendants	Supreme Court of the State of New York, Kings County	Common Stockholder of United
Frank Palumbo, et al., Plaintiffs, v. Electric Bond and Share Company, et al., Defendants	United States District Court for the Southern District of New York	Common Stockholder of United
Andrew Acuzzo, Plaintiff, v. Earle Bailie, et al., Defendants	Supreme Court of the State of New York, Kings County	Common Stockholder of United

Exhibit C.

Title of Action	*Court*	*Plaintiff*
Jennie Britton, et al., Plaintiffs, v. Electric Bond and Share Company, et al., Defendants	Supreme Court of the State of New York, Kings County	Stockholder of Electric
Rebecca Y. Rosenblatt, Plaintiff, v. H. C. Abell, et al., Defendants	Supreme Court of the State of New York, Kings County	Stockholder of Electric
Henriette M. Hoffman, Plaintiff, v. Electric Bond and Share Company, et al., Defendants	Supreme Court of the State of New York, Kings County	Common Stockholder of United
A. Shell Lezberg, et al., Plaintiffs, v. Groesbeck, et al., Defendants	United States District Court for the Southern District of New York	Stockholder of Electric
Rebecca Y. Rosenblatt, Plaintiff, v. H. L. Dickerson, et al., Defendants	United States District Court for the Southern District of New York	Stockholder of Electric
Helen Katz, Plaintiff, v. Ernest B. Tracy, et al., Defendants	Supreme Court of the State of New York, New York County	Stockholder of Electric
Jeanne Koster, Plaintiff, v. Earle Bailie, et al., Defendants	Supreme Court of the State of New York, New York County	Stockholder of Electric

Pending a final order herein, the institution of any other action or proceeding in this or any other forum, by or on behalf of United, Electric or Bond and Share, or any of their respective security holders with respect to any of the acts or transactions encompassed by the Plan or the Commission's Order of September 7, 1944 would interfere with, or tend to interfere with, compliance with said Order and the orderly enforcement of the Plan in this Court, and would result in unnecessary expense and

delay, and might result in reparable damage to United, Electric, and/or Bond and Share, and/or their respective security holders.

WHEREFORE, applicant respectfully prays that the Court, in accordance with the provisions of Section 11(e) of the Act, take the following action:

(a) Hold a hearing on this application;

(b) Order United to give such notice of said hearing to the participants in the proceedings before the Commission and to the holders of its common stock and option warrants for the purchase of its common stock and to other persons as the Court may deem appropriate;

(c) After such notice and hearing, approve the plan as fair and equitable and as appropriate to effectuate the provisions of Section 11(b) of the Act;

(d) Enjoin, during the pendency of these proceedings, all security holders of United, Bond and Share and Electric and all other persons from doing any act or taking any action interfering with, or tending to interfere with, these proceedings or with the carrying out of the plan, and compliance with the order of the Commission approving it, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any Court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court or the Circuit Court of Appeals, as may be appropriate under the Act or the rules and regulations promulgated thereunder;

(e) Order United, Bond and Share and Electric and their officers, directors and agents to take such steps and do such acts as may be necessary for the purpose of enforcement of said order of the Commission approving the plan and carrying out the terms and provisions of the plan;

(f) After approval of the plan, enjoin all security holders of United, Bond and Share and Electric and all other persons from doing any act or taking any action interfering with or tending to interfere with these proceedings, with the enforcement of said order of the Commission or with the carrying out of the plan, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any Court or before any executive or administrative officer, commission, or tribunal, other than such proceedings before the Commission or this Court or the Circuit Court of Appeals as may be appropriate under the Act or the rules and regulations promulgated thereunder;

(g) Grant such other, further and different relief and enter such other orders or decrees as the Court may find to be just and equitable in the premises.

(sgd) MORTON E. YOHALEM,
Morton E. Yohalem, Counsel
Public Utilities Division

September 8, 1944.

Exhibit D.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

IN THE MATTER OF UNITED GAS CORPORATION ELECTRIC BOND AND SHARE COMPANY *and* ELECTRIC POWER & LIGHT CORPORATION	A Proceeding to Enforce a Plan Pursuant to Section 11(e) and 18(f) of the Public Utility Holding Company Act of 1935 Civil Action 471

ORDER

On this 8th day of September, 1944 upon consideration of the Application of the Securities and Exchange Commission, filed herein on the 8th day of September, 1944, and on motion of counsel for said Commmission, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That a hearing be held on the 29th day of September 1944 at 10:30 A. M., in the District Court of the United States for the District of Delaware at the United States Court House, Wilmington, Delaware, before the Honorable Paul Leahy, District Judge, for the purpose of determining whether the plan dated March 1, 1944 proposed by United Gas Corporation, Electric Bond and Share Company and Electric Power & Light Corporation pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 is fair and equitable and appropriate to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935, and whether the Court should enforce and carry out the terms and provisions of the plan, and for

such other purposes as may appear necessary or appropriate in the premises;

2. That United Gas Corporation give notice of said hearing to the holders of its common stock and option warrants for the purchase of its common stock insofar as the identity of such persons is known or available to it, and to every other person, or his attorney of record, who entered an appearance at the hearing before the Securities and Exchange Commission, with respect to the plan, by mailing postage prepaid to his or her last known address a copy of the Notice attached hereto and marked Exhibit I and a copy of the Commission's Findings and Opinion dated September 7, 1944, exclusive of the Appendices therein contained, copies of which shall be obtainable on request free of charge from United Gas Corporation, 2 Rector Street, New York 6, New York, and that notice be given to all other persons by publication once in a newspaper of general circulation published in the Cities of New York, New York; Chicago, Illinois; Philadelphia, Pennsylvania; Boston, Massachusetts; Houston, Texas; and Shreveport, Louisiana in the form hereto annexed as Exhibit I, and that such notices be mailed and published respectively on or before the 16th day of September, 1944.

3. That on or before September 25th, 1944, any person who proposes to oppose the application of the Securities and Exchange Commission and the enforcement and carrying out of the terms and provisions of said plan and the approval of this Court of said plan, shall serve by mail on Morton E. Yohalem, Counsel for the Public Utilities Division of the Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania, on Reid & Priest, Counsel for United Gas Corporation, at 2 Rector Street, New York 6, New York; on Simpson, Thacher and Bartlett, Counsel for Electric Bond and Share Company, at 120 Broadway, New York 5, New York; and on Wright,

Exhibit D.

Gordon, Zachry, Parlin and Cahill, Counsel for Electric Power & Light Corporation at 63 Wall Street, New York 5, New York, copies of a written statement of objections and any brief proposed to be filed in support thereof and shall file such statement and brief on or before such date with the Clerk of this Court. Such statement of objections shall be addressed to the Commission's Application herein and to the Commission's Findings and Opinion dated September 7, 1944, referred to above, and shall state in detail, and in the manner required for pleadings by the Rules of Civil Procedure, the extent to which such statement challenges the allegations and findings therein contained, together with any affirmative defense or objections to said application.

4. That during the pendency of these proceedings all security holders of United Gas Corporation, Electric Bond and Share Company and Electric Power & Light Corporation and all other persons be, and they are hereby, enjoined and restrained from doing any act or taking any action interfering with or tending to interfere with these proceedings or with the carrying out of the plan and compliance with the order of the Commission approving it, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or the rules and regulations promulgated thereunder and, such review, if any, in the Circuit Court of Appeals as may be provided by law.

By the Court.

(sgd.) PAUL LEAHY,
United States District Judge.

Exhibit I.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF DELAWARE.

IN THE MATTER OF UNITED GAS CORPORATION ELECTRIC BOND AND SHARE COMPANY *and* ELECTRIC POWER & LIGHT CORPORATION	A Proceeding to Enforce a Plan Pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935 Civil Action 471

NOTICE

TO THE HOLDERS OF COMMON STOCK AND OPTION WARRANTS FOR THE PURCHASE OF COMMON STOCK OF UNITED GAS CORPORATION AND TO ALL OTHER PERSONS

NOTICE IS HEREBY GIVEN, pursuant to an Order of the District Court of the United States for the District of Delaware in the above-entitled cause dated the 8th day of September, 1944, that the Securities and Exchange Commission has filed an Application in said Court to enforce and carry out the terms and provisions of the plan of reorganization dated March 1, 1944 of United Gas Corporation under Section 11(e) of the Public Utility Holding Company Act of 1935, approved by the Securities and Exchange Commission on the 7th day of September, 1944 to effectuate the provisions of Section 11(b) of said Act with respect to United Gas Corporation, Electric Bond and Share Company, and Electric Power & Light Corporation and that a hearing will be held before the Honor-

able Paul Leahy, District Judge, sitting as a Judge of said District Court of the United States at the United States Court House in Wilmington, Delaware, on the 29th day of September, 1944, at 10:30 A. M. for the purpose of determining whether the Court should enforce and carry out the terms and provisions of said plan, and whether said plan is fair and equitable and appropriate to effectuate the provisions of Section 11(b) of said Act for such other purposes as may appear necessary or appropriate in the premises.

Copies of the Commission's Findings and Opinion dated September 7th, 1944 together with the Appendices referred to therein may be obtained on request and free of charge from United Gas Corporation at 2 Rector Street, New York 6, New York.

Any person who proposes to oppose the enforcement and carrying out of the terms and provisions of said plan or the approval of the plan by said Court, is required by said order of the Court to serve, on or before the 25th day of September, 1944, on Morton E. Yohalem, Counsel for the Public Utilities Division of the Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania; on Reid & Priest, Counsel for United Gas Corporation, at 2 Rector Street, New York 6, New York; on Simpson Thacher and Bartlett, Counsel for Electric Bond and Share Company, at 120 Broadway, New York 5, New York, and on Wright, Gordon, Zachry, Parlin and Cahill, Counsel for Electric Power & Light Corporation at 63 Wall Street, New York 5, New York, copies of a written statement of objections and any brief proposed to be filed in support thereof and shall file such statement and brief on or before such date with the Clerk of said District Court of the United States. The Court's order provides that such statement of objections shall be addressed to the Commission's Application to said Court

and to its said Findings and Opinion and shall state in detail, and in the manner required for pleadings by the Rules of Civil Procedure for the District Courts of the United States, the extent to which such statement challenges the allegations and findings therein contained, together with any affirmative defense or objection to said Application.

NOTICE IS FURTHER GIVEN that during the pendency of these proceedings all security holders of United Gas Corporation, Electric Bond and Share Company and Electric Power & Light Corporation and all other persons are enjoined and restrained from doing any act or taking any action interfering with or tending to interfere with these proceedings or with the carrying out of the plan in compliance with the order of the Commission approving it, including the commencement or prosecution of any action, suit or proceeding at law or in equity or under any statute in any Court or before any executive or administrative officer, commission or tribunal other than such proceedings before the Commission or this Court as may be authorized by the Act or rules and regulations promulgated thereunder, and, such review, if any, in the Circuit Court of Appeals as may be provided by law.

UNITED GAS CORPORATION

By .....
President

Affidavit of Samuel Okin in Opposition to Motion to Dismiss.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

[TITLE OMITTED]

State of New York, } ss.:
County of New York, }

SAMUEL OKIN being duly sworn, deposes and says that he is the petitioner in the above entitled proceeding and is fully familiar with all the facts hereinafter stated.

Because of the lack of time for the submission of the necessary papers by deponent in opposition to the motion of the Securities and Exchange Commission to dismiss the petition in the above entitled proceeding, and the fact that the brief in opposition to said motion by deponent is approximately 70 pages in length, deponent respectfully requests that the facts and statements appearing at pages 1 to 36, inclusive, of the petition filed by the petitioner with the above named Court on the 20th day of September, 1944, be incorporated into this affidavit with the same force and effect as though fully stated herein, and that said facts and statements in said petition be considered reiterated and restated herein, with the same force and effect as though fully stated herein, and that said facts and statements be considered by this Court in opposition to the motion of the said Commission. Likewise deponent respectfully asks that the additional facts and statements appearing at pages 31 to 34, inclusive, and pages 38 to 51, inclusive, of the affidavit of deponent sworn to the 28th day of September, 1944, and filed by deponent with this

Court in support of deponent's motion for a stay of proceedings before the United States District Court for the District of Delaware, be incorporated into this affidavit with the same force and effect as though fully stated herein, and that the said facts and statements in said affidavit, be considered reiterated and restated herein, with the same force and effect as though fully stated herein, and that said facts and statements be considered by this Court in opposition to the motion of the Commission.

Deponent respectfully states that it is his opinion that the order of the Commission dated the 7th day of September, 1944, which is the subject matter of this proceeding, is final and is properly before this Court for review under Section 24(a) of the Public Utility Holding Company Act of 1935. (See L. J. Marquis & Co. v. Securities and Exchange Commission, 134 Fed. (2d) 822); Marquis v. Securities and Exchange Commission, 134 Fed. (2d) 335 (C. C. A. 2d Cir.); Columbia Oil & Gasoline Corp. v. Securities and Exchange Commission, 134 Fed. (2d) 265, C. C. A. 3rd); In re Securities and Exchange Commission (Otis & Co., Intervenor) 142 Fed. (2d) 411, 420, 421 (C. C. A. 3rd. Cir.).

The attempt of the Commission on this motion to claim that the order dated the 7th day of September, 1944, is interlocutory because of the following provision contained in the said order:

> "IT IS FURTHER ORDERED that this Order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the plan herein approved."

is in deponent's opinion without any basis in law whatsoever. The aforesaid provisions are in deponent's opinion merely a restatement of the provisions of Section 11(e) of the Public Utility Holding Company Act of 1935 which require that the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce and carry out the terms and provisions of such plan, and that the court upon such application, after notice and opportunity for hearing, if it finds that the plan is fair and equitable and appropriate to effectuate the provisions of Section 11, the court is empowered to approve such plan. These provisions of Section 11(e) however are intended only in the case where the company can not obtain the necessary approval of the stockholders of the company, and the proceeding before the District Court, in deponent's opinion, in no way affects the order of the Commission. As a matter of fact, the Act provides for two distinct processes with respect to a plan filed under Section 11(e); (a) the Commission after notice and opportunity for hearing, must find the plan *necessary to effectuate the provisions of subsection (b) of the Section 11 and fair and equitable to the persons affected by such plan;* and (b) the Court after notice and opportunity for hearing must find the plan *as fair and equitable and as appropriate to effectuate the provisions of section 11.* The attempted claim of the Commission that the proceedings before the District Court fully protect petitioner and that he should not be permitted to seek review in this Court of the Commission's order, is not only in deponent's opinion contrary to the specific provisions of the Public Utility Holding Company Act of 1935 and its expressed intent and purpose, but in addition actually petitioner after the argument of his motion for a stay herein on October 2, 1944, found that on October 3, 1944, the said District Judge refused to per-

mit petitioner to continue with the cross-examination of his witness in support of his objections and defenses to the plan before the Court and refused to permit petitioner to have other witnesses sworn to testify in support of petitioner's affirmative defenses. We thus have a situation where the Commission attempts to deprive this petitioner of a review in this Court under Section 24(a), and the District Judge takes the position that deponent cannot proceed with the eliciting of his testimony of witnesses before the District Court with respect to the plan before it.

The attempt of the Commission on this motion to contend that only the orders made under subsection (b) of Section 11 of the Act are reviewable under Section 24(a) of the Act, is in deponent's opinion predicated completely on a wholly mistaken construction of the Act. In the accompanying brief we have referred to contents of Senate Report 621 which accompanied the said Public Utility Holding Company Act of 1935, and an examination of said report and said subsections (c), (d), (e) and (f) of the said Section 11, show very clearly that the said subsections (c), (d), (e) and (f) were intended to constitute the enforcement proceedings of orders made under subsection (b) of said Section 11. It is deponent's opinion that the attempt on the part of the Commission to argue that subsections (c), (d), (e) and (f) are to be completely segregated from subsection (b) of section 11, and that an order made by the Commission under subsection (e) of section 11 shall not be reviewed by this Court is wholly fallacious. The attempt further to argue that the finding by the Commission that the plan is necessary to effectuate the provisions of subsection (b) of the Section 11, by the Commission, is the same as the required finding by the Court that the plan is appropriate to effectuate the provisions of section 11, is in deponent's opinion with-

out foundation. Congress used different language for the finding by the Commission as distinguished from the required finding by the Court, and any attempt to claim that the carefully chosen language by Congress obviously different in purport, means the same thing, is in deponent's opinion a wholly fallacious argument.

The contention of the Commission that the case of *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375, supports their contention, is wholly without foundation in deponent's opinion. The said decision merely held that a procedural order is not reviewable. How any one can possibly contend that the order of the Commission dated the 7th day of September, 1944, comes within the class of procedural orders is beyond the stretch of deponent's imagination. As a matter of fact at page 10 of its brief, Commission makes the following statements:

> "The Commission's order approving the plan is, of course, final so far as the Commission is concerned and as such both susceptible of enforcement and of 'review' incident to the enforcement proceedings in the District Court."

The contention that the said order of the Commission is reviewable by the District Court in the enforcement proceedings is wholly without any foundation in statute (The Public Utility Holding Company Act of 1935). The District Court under the Act has no power to review the order of the Commission.

It is advisable at this point to remind this Court that the said order of the Commission approves many other matters besides the approval of the plan.

The attempt by the Commission to insert into its order the provisions hereinbefore referred to, which are nothing more or less than what the Act provides for, certainly adds

nothing to the order and unquestionably cannot in deponent's opinion constitute any basis for depriving this Court of the power to review the said order of the Commission under Section 24(a) of the said Act. In this Court alone can deponent obtain a review of the said order and the other relief sought in his petition, and if this Court were to grant the motion of the Commission and dismiss petitioner's petition, deponent states without any qualifications that it is his opinion that in no other tribunal other than this Court will this petitioner ever be able to obtain a review of the said order of the Commission and that such action on the part of this Court will in deponent's opinion, deprive him of his constitutional right not to be deprived of his property without due process of law.

It may be opportune at this point to refer to other types of orders which have been held reviewable:

In *Columbia Broadcasting Company, Inc.* v. *United States,* 316 U. S. 407, at page 425 the Court said:

> "But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

A judgment in a proceeding for a writ of prohibition is final and reviewable.

In re Mt. Vernon, 240 U. S. 30;
Missouri v. *Taylor,* 266 U. S. 200.

An order allowing attorney's fees made in the progress of a creditor's suit is final and appealable.

Central Trust Co. v. *U. S. Heating Co.* (C. C. A. 2d) 233 Fed. 420;
Tuttle v. *Claflin*, 88 Fed. 122.

An order adjudging that a creditor is not entitled to a preference in insolvency proceedings is final and appealable.

Yorkshire and American Invest. Mort. Co. v. *Fowler*, 78 Fed. 57.

An order of the District Court in a proceeding instituted by the Interstate Commission to compel answers to certain questions is final and appealable.

Ellis v. *Interstate Com. Com.* 237 U. S. 434.

A decree directing a receiver in a foreclosure suit to turn over the mortgaged property to a receiver of a state court is final and appealable.

Empire Trust Co. v. *Brooks*, 232 Fed. 641 (C. C. A. 5th).

A decree dismissing an auxiliary bill in a foreclosure proceeding, but retaining the cause, and referring it to a master, is final as to the auxiliary bill, and appealable by auxiliary complainants.

Grant v. *E. & W. R. Co.*, 50 Fed. 795 (C. C. A. 5th).

WHEREFORE, deponent respectfully asks that the motion of the Securities and Exchange Commission to dismiss the petition filed by the petitioner with this Court to review the

order of the said Commission dated the 7th day of September, 1944, referred to more fully in the petition herein, be denied in all respects.

SAMUEL OKIN.

Sworn to before me this
9th day of October, 1944.

BARBARA J. MYERS,
Commissioner of Deeds,
New York City.
N. Y. Co. Clks. No. 66, Reg. No. 6-M-27.
Kings Co. Clks. No. 47, Reg. No. 6-M-23.
Commission Expires July 11, 1946.

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 19496

SAMUEL OKIN,

Petitioner,

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Before:

SWAN and CLARK, *Circuit Judges.*

Motion by the Securities and Exchange Commission to dismiss a petition filed by Samuel Okin for review of an order of the Commission conditionally approving a plan

filed under the Public Utility Holding Company Act of 1935, § 11(e), 15 U. S. C. A. § 79k(e), for the reorganization of United Gas Corporation. Motion granted and petition dismissed.

MORTON E. YOHALEM, Public Utilities Division Securities and Exchange Commission, of Philadelphia, Pa. (Roger S. Foster, Sol., and Sidney H. Willner, Atty., Securities and Exchange Commission, both of Philadelphia, Pa., on the brief), for the motion.

SAMUEL OKIN, of New York City, pro se, petitioner, in opposition.

REID & PRIEST, of New York City, for United Gas Corporation, Wright, Gordon, Zachry, Parlin & Cahill, of New York City, for Electric Power & Light Corporation, and Simpson, Thacher & Bartlett, of New York City, for Electric Bond and Share Company, also filed affidavits in support of the motion.

CLARK, *Circuit Judge:*

This proceeding comes before us on the motion of the Securities and Exchange Commission to dismiss a petition filed September 20, 1944, by Samuel Okin for review of a Commission order of September 7, 1944, conditionally approving a plan for the reorganization of United Gas Corporation filed by that corporation, its parent, Electric Power & Light Corporation, a registered holding company, and the latter's parent, Electric Bond and Share Company, also a registered holding company. The reorganization plan provides, primarily, for the sale by United Gas Corporation of $100,000,000 of First Mortgage Bonds,

the proceeds of which are to be used to retire that company's publicly held First Preferred Stock at its contract redemption price and to provide for the payment of $44,000,000 in cash to the Electric Bond and Share Company in full settlement of all its claims against the United Gas Corporation, including $52,925,000 in debt claims. The motion to dismiss is based on the contention that jurisdiction to review the plan and all objections to it is now vested in the United States District Court for the District of Delaware, wherein the Commission filed a petition for enforcement of the plan on September 8, 1944.

Petitioner, a stockholder in Bond and Share, bases his right to a review on § 24(a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. § 79x(a), which provides that "Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business" by filing his petition within sixty days. The section contains detailed procedural provisions, including the requirement that "the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered," whereupon "such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." The Commission relies, however, on the provisions of § 11(e) of the same Act, 15 U. S. C. A. § 79k(e), which, after giving jurisdiction to the Commission to pass upon a plan for the reorganization of any subsidiary company of a registered holding company, states that the Commission may, in accordance with § 18(f) of the Act, 15 U. S. C. A. § 79r(f), apply to the district court of the United States for the proper district to "enforce and carry out the terms and provisions of such plan." Section 11(e) further provides that, if the court, after notice and opportunity for hearing, "shall

approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located," with further power to appoint a trustee to hold or administer the assets so possessed.

It is the Commission's contention that the general provision for review of Commission orders at the behest of a single person must yield to the particular authority given a single district court to pass upon the provisions of a plan as fair and equitable and to enforce it. As supporting this view, it refers to not only the statute above quoted, which makes the approval of the district court a condition precedent to enforcement of the plan, but also the terms of its own order making the plan "operative" only upon the entry of an enforcement order by the appropriate district court. Hence it says that both by fair interpretation of the statute and by express terms of the order of which review is sought, it is as yet merely interlocutory, lacking the finality necessary for immediate review, and further that petitioner does not now show himself "aggrieved" by any order of the Commission. And if and when the district court, which is now conducting hearings, does enter an enforcement order, then all parties in interest will have their usual rights of appeal therefrom.[1]

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[1] The Commission also objects to the standing of petitioner as a party aggrieved, since he is only a stockholder of the grandparent holding company; but this point is not pressed at this time, in view of our holding in a similar case, *Okin* v. *Securities and Exchange Commission*, 2 Cir., 143 F. 2d 945, that its determination is not possible prior to the filing of some record of the proceedings below. Petitioner, in turn, objects to the standing of the three corporations—the debtor and the parent holding companies—to join in support of the Commission's motion, as not that of formal intervenors, a point we need not determine, in view of our decision herewith and their obvious interest at least as *amici curiae*. Petitioner also complains of unfair rulings against him in the district court proceedings in which he has already participated; but such issues are clearly for the court to which by law is committed the review of such proceedings.

the proceeds of which are to be used to retire that company's publicly held First Preferred Stock at its contract redemption price and to provide for the payment of $44,000,000 in cash to the Electric Bond and Share Company in full settlement of all its claims against the United Gas Corporation, including $52,925,000 in debt claims. The motion to dismiss is based on the contention that jurisdiction to review the plan and all objections to it is now vested in the United States District Court for the District of Delaware, wherein the Commission filed a petition for enforcement of the plan on September 8, 1944.

Petitioner, a stockholder in Bond and Share, bases his right to a review on § 24(a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. § 79x(a), which provides that "Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business" by filing his petition within sixty days. The section contains detailed procedural provisions, including the requirement that "the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered," whereupon "such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." The Commission relies, however, on the provisions of § 11(e) of the same Act, 15 U. S. C. A. § 79k(e), which, after giving jurisdiction to the Commission to pass upon a plan for the reorganization of any subsidiary company of a registered holding company, states that the Commission may, in accordance with § 18(f) of the Act, 15 U. S. C. A. § 79r(f), apply to the district court of the United States for the proper district to "enforce and carry out the terms and provisions of such plan." Section 11(e) further provides that, if the court, after notice and opportunity for hearing, "shall

approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located," with further power to appoint a trustee to hold or administer the assets so possessed.

It is the Commission's contention that the general provision for review of Commission orders at the behest of a single person must yield to the particular authority given a single district court to pass upon the provisions of a plan as fair and equitable and to enforce it. As supporting this view, it refers to not only the statute above quoted, which makes the approval of the district court a condition precedent to enforcement of the plan, but also the terms of its own order making the plan "operative" only upon the entry of an enforcement order by the appropriate district court. Hence it says that both by fair interpretation of the statute and by express terms of the order of which review is sought, it is as yet merely interlocutory, lacking the finality necessary for immediate review, and further that petitioner does not now show himself "aggrieved" by any order of the Commission. And if and when the district court, which is now conducting hearings, does enter an enforcement order, then all parties in interest will have their usual rights of appeal therefrom.[1]

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[1] The Commission also objects to the standing of petitioner as a party aggrieved, since he is only a stockholder of the grandparent holding company; but this point is not pressed at this time, in view of our holding in a similar case, *Okin* v. *Securities and Exchange Commission*, 2 Cir., 143 F. 2d 945, that its determination is not possible prior to the filing of some record of the proceedings below. Petitioner, in turn, objects to the standing of the three corporations—the debtor and the parent holding companies—to join in support of the Commission's motion, as not that of formal intervenors, a point we need not determine, in view of our decision herewith and their obvious interest at least as *amici curiae*. Petitioner also complains of unfair rulings against him in the district court proceedings in which he has already participated; but such issues are clearly for the court to which by law is committed the review of such proceedings.

Finally, the practicalities of the situation press heavily for this result. It is hardly conceivable that a petition for review by a single individual should bar proceedings on the plan in the district court; for that would mean that the holder of an inconsiderable interest, such as the petitioner here actually is, would force all the other parties either to follow his course or await the outcome of his litigation. Indeed, parties who were relying on the district court's notice of opportunity to be heard—required by § 11(e)—would naturally allow the sixty-day period for review to elapse without filing their petition in some distant appellate court. But if the two proceedings advance simultaneously, the resulting situation is even less attractive. Which of two probably conflicting orders should prevail is, of course, not made clear; since the district court has the ultimate responsibility for determining whether the plan is fair and equitable, it would seem that in final analysis that court must have authority to nullify any opposing action of any other court. On the other hand, petitioner is afforded complete relief by the right of appeal accorded all persons aggrieved by a district court order. True, he may have to go to the court of the corporations' domicile in order to present his objections; but it is quite clear that in the case of these vast corporate structures, no unified judicial control is possible unless some of the parties must travel somewhat beyond the confines of their own circuit. The confusion and delay incident to allowing this review, contrasted to the insignificant inconvenience caused the petitioner by dismissal of his present petition, make the indicated result here not at all doubtful.

Cases relied on by the petitioner do not seem to us to controvert this conclusion. Thus, in *L. J. Marquis & Co. v. Securities and Exchange Commission*, 3 Cir., 134 F. 2d 822, the point is not discussed beyond an assertion of exclusive jurisdiction in a single circuit court—a view we

had already followed. *L. J. Marquis & Co.* v. *Securities and Exchange Commission*, 2 Cir., 134 F. 2d 335; cf. *Okin* v. *Securities and Exchange Commission*, 2 Cir., 134 F. 2d 333. We are informed, however, that the plan there did not specifically describe the mode of enforcement contemplated, and the companies requested court enforcement only after the circuit court of appeals had already obtained "exclusive jurisdiction" under § 24(a). Whether or not the issue was squarely presented is not clear, since it came up merely on an application for a stay of the there earlier proceedings, which was denied without opinion. The case of *In re Securities and Exchange Commission* (*Otis & Co., Intervener*), 3 Cir., 142 F. 2d 411, actually tends to support dismissal of this petition. There the court held—on an appeal from a district court decree, D. C. Del., 51 F. Supp. 217—that a party who had not participated in the proceedings before the Commission could, nevertheless, intervene in the district court enforcement proceeding and appeal therefrom, since such enforcement proceeding was in the nature of a review. Hence this case supports the contention that § 11(e) provides for an orderly method of review other than that contemplated by § 24(a).

We conclude, therefore, that petitioner must be referred to the District Court for the District of Delaware for the protection of such rights as he may have in the premises, and that the motion to dismiss the petition for review must be granted. The petition for review is, therefore, dismissed.

I Concur,

T. W. S.

Okin
v.
SEC.
10/20/44

Order Dismissing Petition.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of December, one thousand nine hundred and forty-four.

Present: Hon. THOMAS W. SWAN,
" CHARLES E. CLARK,
Circuit Judges.

[TITLE OMITTED]

A motion having been made herein by counsel for respondent to dismiss the petition herein,

Upon consideration thereof it is

Ordered that the petition herein be and it hereby is dismissed.

THOMAS W. SWAN,
U. S. C. J.

CHARLES E. CLARK,
U. S. C. J.

Order Extending Time Within Which to File Petition for Certiorari.

SUPREME COURT OF THE UNITED STATES

No. 1245, October Term, 1944

Samuel Okin,

Petitioner,

v.

Securities and Exchange Commission.

Upon consideration of the application of the petitioner,

It is ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 29th, 1945.

Robert H. Jackson,
Associate Justice of the Supreme
Court of the United States.

Dated this 27th day of March, 1945.

Order Extending Time Within Which to File Petition for Certiorari.

SUPREME COURT OF THE UNITED STATES

No. 1245, October Term, 1944

Samuel Okin,

Petitioner,

v.

Securities and Exchange Commission.

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 8, 1945.

Robert H. Jackson,
Associate Justice of the Supreme
Court of the United States.

Dated this 26th day of April, 1945.

Stipulation as to Printing of Record.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

It is hereby stipulated and agreed by and between Samuel Okin and the Solicitor General, on behalf of the Securities and Exchange Commission, that only the following portions of the filed certified transcript in the above-entitled cause shall be printed with reference to the petition for a writ of certiorari filed by the said Samuel Okin:

(1) Petition for review.

(2) Commission's motion for dismissal of petition; affidavit in support of motion together with order of Commission dated September 7th, 1944 attached as part of Exhibit B, and petition of Commission in the District Court of Delaware, order of the said District Court and notice of United Gas Corporation attached as Exhibits C and D.

Stipulation as to Printing of Record.

(3) Affidavit in opposition to motion.

(4) Opinion of the Circuit Court of Appeals.

(5) Order dismissing petition.

(6) Orders extending time within which to apply for a writ of certiorari.

It is further stipulated and agreed that either party may make specific reference to any portion of the unprinted certified transcript in the above-entitled cause, as filed with the Clerk of the Supreme Court of the United States.

May 8th, 1945.

SAMUEL OKIN,
Petitioner.

CHARLES FAHY,
Solicitor General.

FILED
MAY 8 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL OKIN,
Attorney for Petitioner,
No. 32 Broadway,
New York City.

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(1) Whether an aggrieved investor affected directly and adversely by an order of the Commission approving a plan under Section 11(e) of the Act and authorizing the use of $44,000,000 of his company's assets, can be deprived of his statutory authority under Section 24(a) of the Act to have a Circuit Court of the circuit wherein he resides or has his principal place of business, review the said Commission order and grant the mandatory relief therein provided for, by the Commission immediately after entering its said order applying to a distant District Court for an order, at the request of the declarant companies, enforcing and carrying out the said plan, is a vitally important Federal question drastically affecting the interests of millions of investors scattered all over the United States who have billions of dollars invested in companies subject to the regulations of the Act, is a question which seriously involves the administration of the Act, has not been but should be settled by this Court 25

(2) The Court below in dismissing the petition for review on the ground that the institution

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Samuel Okin prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the decree of that Court entered in the above-entitled cause on December 30, 1944, dismissing the petition of the said Samuel Okin filed with that Court by the petitioner as an aggrieved person, pursuant to Section 24(a) of the Public Utility Holding Company Act of 1935, for a review of the order of the Securities and Exchange Commission dated the 7th day of September, 1944, pertaining to the United Gas Corporation, Electric Bond and Share Company and Electric Power &

Light Corporation, and that said order and each and every part thereof pertaining to said companies be set aside; and that the Court make an order under said Section 24 (a) granting leave to said petitioner to adduce the additional evidence which he sought to adduce upon the hearing before the said Commission but was prevented by the rulings of the Commission's Trial Examiner as thereafter sustained by the said Commission order and directing that such additional evidence, which is material and necessary be taken before the said Commission.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. sec. 79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. sec. 347(a)). The order of the Court below granting the Commission's motion to dismiss the petition for review was entered on December 30, 1944 (R. 101). On March 27th, 1945, Mr. Justice Jackson, on cause shown, made an order extending to April 29th, 1945 the period during which a petition for writ of certiorari might be filed with respect to the said order of the Court below, and on April 26th, 1945, Mr. Justice Jackson, on cause shown, extended said period to May 8th, 1945 (R. 102-103).

The Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit was rendered on October 24, 1944 and is reported at 145 F. (2d) 206.

The opinion of the Securities and Exchange Commission (hereinafter referred to as the Commission) rendered September 7th, 1944, the order of the Commission of the same date, have not yet been officially reported. The order of the Commission is attached as Appendix A to the Brief annexed hereto.

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. sec. 79), hereinafter referred to as the "Act". The portions of that Act which are directly involved are Sections 24(a), 25 and 11 and other sections which are attached as Appendix B to the Brief annexed hereto.

Statement

Petitioner is the owner of Nine thousand (9,000) shares of the common stock of Electric Bond and Share Company (hereinafter referred to as Bond and Share) of a total of 5,250,357.66 shares of common stock outstanding, and petitioner is one of the largest individual stockholders of record of a total of approximately 90,000 scattered all over the United States, Central and South America, Canada, Europe and elsewhere (R. 1).

Said 9,000 shares of common stock owned by petitioner has a market value of approximately $115,000 and it is petitioner's opinion that said stock has an actual value of approximately $250,000 (R. 1).

During 1930 and 1931 Bond and Share loaned to the United Gas Corporation (hereinafter referred to as United Gas) the sum of $25,925,000 in cash for which United Gas in December, 1931, made and delivered to Bond and Share its 6% demand note in the sum of $25,925,000, no part of which principal sum had been paid up to the time of the filing of the said petition in the Court below, and the interest thereon had been paid at fixed periods in the past (R. 2).

Bond and Share in 1935 loaned to United Gas the sum of $3,000,000 in cash, at 6% interest, no part of which principal sum had been paid up to the time of the filing of the said petition, except the sum of $1,000,000 which

left an unpaid balance of $2,000,000, the interest on which had been paid at fixed periods in the past (R. 2).

United Gas in 1936 owned $25,000,000 principal amount of 6% bonds of its subsidiary, United Gas Public Service Company, which United Gas then sold to Bond and Share and received therefor the sum of $25,000,000 in cash together with accrued interest on said bonds. Thereafter the said United Gas Public Service Company was merged with United Gas which assumed the payment of the aforesaid bonds. No part of the said principal sum of $25,000,000 had been paid up to the time of the filing of the said petition in the Court below, and interest thereon had been paid at fixed periods in the past (R. 2).

Bond and Share purchased in the open market prior to 1935 $440,000 principal amount of 5% First Mortgage Gold Bonds of the Houston Gas Securities Company, a subsidiary of United Gas, at a cash cost to Bond and Share of $309,920. Thereafter Houston Gas Securities Company was merged with United Gas which assumed the payment of said bonds, no part of which principal sum had been paid at the time of the filing of the said petition in the Court below, and the interest on which had been paid at fixed periods in the past (R. 3).

By reason of the aforesaid, United Gas at the time of the filing of the said petition was indebted to Bond and Share in the sum of $53,365,000, no part of which principal sum having been paid at that time (R. 3).

In addition to the foregoing, Bond and Share at that time owned the following securities of United Gas; 17,310 shares of $7 preferred stock, representing a cash cost to Bond and Share of $1,594,913.83 and which then had a market value of approximately $1,990,650; 752,666 shares of common stock, which then had a market value of approximately $1,300,000, of which 278,325 shares of common stock was acquired by Bond and Share at a book cost of $3,955,900 representing the capital stock

liability of Bond and Share with respect to 39,559 shares of its $6 preferred stock issued for said 278,325 shares of common stock and $309,075.87 represented the cash cost of other shares of the said common stock; and 151,005 option warrants for the purchase of common stock (R. 4).

Bond and Share, a New York corporation, is a registered holding company under the Act. Electric Power & Light corporation, a registered holding company under the Act, was at the time of the filing of the said petition in the Court below, the owner of all the 884,680 shares of $7 second preferred stock of United Gas which represented a capital stock liability of $88,468,000, and also owned 3,795,086 shares (48.54%) of the common stock of United Gas and 3,600,040 option warrants (73.99%) of said corporation. As of June 1, 1944, the arrearages on said second preferred stock of United Gas amounted to $85.75 per share or a total of $75,861,310 on the said 884,680 shares (R. 4).

Bond and Share owns the following securities of Electric Power & Light Corporation (hereinafter referred to as Electric) which represents a carrying value to Bond and Share as shown by its books, of the sum of $36,606,915.55, of which sum $34,105,016.18 represents cash cost and $2,583,750 represents the portion acquired from Electric Investors, Inc., and which securities are as follows: 485 shares (.09%) of the $7 preferred stock; 13,905 shares (18.43%) of the $7 second preferred stock; 1,976,638 shares (57.25%) of the common stock; and 393,408 warrants; which said securities held by Bond and Share represent 46.84% of the total voting power represented by all the securities of Electric. Electric is a statutory subsidiary of Bond and Share and United Gas is a statutory subsidiary of Electric. Bond and Share controls Electric which in turn controls United Gas (R. 4).

In May, 1941 (R. 5), United Gas and certain of its subsidiaries filed a declaration with the Commission seeking

approval for the issuance and sale by United Gas of $75,000,000 principal amount of First Mortgage and Collateral Trust Bonds, 3¼% series due 1958, to 14 insurance companies at a price of 99.34. United Gas proposed in its said declaration to use the net proceeds of such sale as follows (R. 5):

> (1) To retire $28,850,000 principal amount of United Gas Public Service Company debentures 6% due July 1, 1953, assumed by United Gas; $25,000,000 principal amount of which was held by Bond and Share and $3,850,000 principal amount was held by Houston Gas Securities Company, all of whose capital stock was then owned by United Gas.
>
> (2) To pay the 6% demand note of United Gas in the principal amount of $25,925,000 held by Bond and Share.
>
> (3) To repay an open account indebtedness of $2,000,000 to Bond and Share.
>
> (4) To purchase $6,000,000 principal amount of First Mortgage and Collateral Trust Bonds, 4% series due 1961 to be issued by United Gas Pipe Line Company.

The declaration of United Gas (File No. 70-314) stated that its management was considering recommending the use of a substantial portion of the remaining proceeds for payment of the dividend arrearages on the $7 preferred stock of United Gas, then amounting to $9,502,490 (as of May, 1941), but which was subsequently reduced as of November 1, 1944, to the sum of $3,263,303, by dividends declared on account of arrearages (R. 6).

Simultaneously, in May, 1941, Bond and Share filed with the Commission its declaration (File No. 70-315) wherein it sought permission to use the said sum of approximately $53,365,000 which it was to receive from

United Gas under its declaration, hereinbefore referred to, together with approximately $6,000,000 from its own treasury to reduce its outstanding preferred stock, on any basis available, whether it be by invitation or tenders, purchases in the open market, pro rata payment in liquidation, or by any other appropriate method (R. 6).

As of December 31, 1943, Bond and Share had outstanding $94,944,700 of its $6 preferred stock which had been reduced by market purchases to $90,072,900 as of May 27, 1944; and had outstanding on December 31, 1943, $24,599,700 of its $5 preferred stock which had been reduced to $22,530,000 by market purchases as of May 27, 1944 (R. 6).

On May 31, 1941, the Commission issued its Notice and Order for Consolidated Hearings wherein it was directed that the hearings with respect to the declarations of the aforesaid United Gas and its subsidiaries (File No. 70-314) and Bond and Share (File No. 70-315) be consolidated with the proceeding previously instituted by the Commission against Bond and Share, Electric, United Gas, and certain of its subsidiaries under sections 11(b)(2), 12(b), (12(c) and 12(f) of the Act (File No. 59-21) and also the proceeding commenced by the said Commission by the same order entitled In the Matter of Investigation of organization and financing of United Gas Corporation and its subsidiaries under sections 18(a) and 18(b) of the Act (File No. 4-33) (R. 6).

The said consolidated proceeding hearing continued until about the month of January, 1942, when the management of Bond and Share agreed, after conferences with the staff of the Commission and officers of United Gas, that the Bond and Share claims of $52,925,000 against United Gas, hereinbefore more fully referred to, should be subordinated to new bonds in the aggregate amount of $70,000,000 intended then to be issued by United Gas and sold to the said 14 insurance companies. It was intended

by the said management of Bond and Share to permit United Gas to use the proceeds of the said bond issue of $70,000,000 to redeem the first preferred stock of the debtor, United Gas, pay a premium for redemption and arrearages thereon, all of which would then have amounted to approximately the sum of $55,000,000. When petitioner learned of the foregoing, he made strenuous protests and succeeded in stopping this intended subordination (R. 7).

On June 8th, 1942, the consolidated hearing was reconvened by order of the Commission, further testimony was taken therein until September, 1943, when the said hearing was completed and concluded with respect to all matters except the accounts and structures of certain subsidiary companies of United Gas. Pursuant to leave granted by the Commission's Trial Examiner, petitioner participated in the said reconvened hearing and cross-examined witnesses therein (R. 8, 9).

Following the close of the said record as aforesaid various discussions took place between the staff of the Commission, officers of Bond and Share and United Gas and Electric, and their counsel, wherein the staff of the Commission, in violation of their statutory duties under the Act and contrary to its mandates, sought to unlawfully influence the officers and directors of Bond and Share to substantially reduce the Bond and Share claims of $53,365,000 against United Gas and to surrender the valuable stock interests in United Gas owned by Bond and Share which then had a market value of approximately $3,300,000 (R. 8). When during the course of said conferences, the officers and directors of Bond and Share either refused to accede to the demands of the Commission's staff, as aforesaid, or else suggested that the Commission's staff first take some affirmative action before the management of Bond and Share would accede to the said demands of the Commission staff, thereafter and on or about the 3rd day of November, 1944, the said Commission staff filed with

the Commission and caused to be served upon the attorneys for Bond and Share, United Gas and Electric, proposed Findings of Fact, Conclusions of Law and Recommendations which were deliberately kept from petitioner as a participant in the said consolidated proceedings, but in which recommendations the said staff of the Commission requested that the Commission immediately enter an order prohibiting all payments of interest and principal on the debt claims of Bond and Share against United Gas.

It was these proposed Findings of Fact, Conclusions of Law and Recommendations, filed as aforesaid by the Commission's staff, which in November, 1943, compelled the officers and directors of Bond and Share to accept the ultimatum of the Commission's staff that Bond and Share accept $44,000,000 for its claims against United Gas aggregating $53,365,000 and the securities of United Gas owned by Bond and Share, as aforesaid, which then had a value of approximately $3,300,000, or else the said Commission's staff threatened to apply to the Commission for the said order prohibiting all payments of interest and principal on the aforesaid debt claims, pending the determination of the issues in the proceedings pending before the Commission and in said proposed Findings and Opinion the said staff of the Commission further recommended that the Commission find and order the subordination of the claims of Bond and Share against United Gas and its stock interests therein to that of all the publicly held stock in United Gas including the stock therein owned by Electric, as aforesaid.

Not only were the aforesaid proposed Findings of Fact, Conclusions of Law and Recommendations kept from petitioner by specific direction of the Commission, not only were the aforesaid conferences held privately after the close of said hearings and petitioner not given any opportunity to participate therein, but thereafter when Bond and Share decided to meet the demands of the

Commission staff and accept the sum of $44,000,000 for its claims and securities, as aforesaid, a result which probably was influenced by what members of the Commission may have privately told the officers and directors of Bond and Share; the Commission directed that the copies of the said proposed Findings and Opinion and Recommendations and proposed Order be returned by the attorneys for the parties upon whom they had been served and that the said documents be withdrawn from the records of the Commission.

Pursuant to said private arrangements made by the Commission staff with the officers and directors of Bond and Share, United Gas and Electric, and their attorneys, as aforesaid, and shortly prior to the 6th day of March, 1944, United Gas filed with the Commission what is claimed to be a plan of reorganization of said United Gas under the provisions of Section 11(e) of the Act, which said alleged plan was joined in by Bond and Share and Electric, wherein the following was proposed (R. 9):

> (1) United Gas Corporation would file an amendment to its previously described filing herein (File No. 70-314) in which amendment it would seek approval of the issuance and sale of the sum of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds.
>
> (2) Electric Power & Light Corporation would acquire from Electric Bond and Share Company for a cash purchase price of $44,000,000 the following claims in and against United Gas Corporation held by Electric Bond and Share Company:
>
> > (a) $25,000,000 principal amount of 6% debentures, due 1953, of United Gas Public Service Company assumed by United Gas Corporation.
> >
> > (b) The 6% demand note of the United Gas Corporation in the principal amount of $25,925,000.

(c) The 6% open account indebtedness from United Gas Corporation to Electric Bond and Share Company of $2,000,000.

(d) $440,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company assumed by United Gas Corporation.

(e) 17,310 shares of $7 preferred stock, 752,666 shares of common stock, 151,005 option warrants for the purchase of common stock of United Gas Corporation.

(3) Electric Power & Light Corporation would surrender to United Gas Corporation as a capital contribution the 17,310 shares of $7 preferred stock of United Gas Corporation acquired by it from Electric Bond and Share Company in the transaction described in paragraph (2) above and United Gas Corporation would cancel the said shares.

(4) United Gas Corporation would redeem and cancel the 432,512 shares of $7 preferred stock held by the public at their redemption price of $110 per share plus accumulated dividends thereon to the redemption date, employing for such purposes so much of the proceeds of the sale of its First Mortgage and Collateral Trust Bonds as may be necessary therefor (approximately $53,000,000).

(5) United Gas Corporation would declare and pay a dividend on its $7 second preferred stock, all of which was held by Electric Power & Light Corporation of 12,385,520 shares of its $1 par value common stock, and Electric Power & Light Corporation would accept such stock dividend in payment of $12,385,520 of the accumulated and unpaid dividends on such stock.

(6) Electric Power & Light Corporation would surrender to United Gas Corporation for cancellation

444,680 shares of United Gas Corporation's $7 second preferred stock together with all rights to accumulated undeclared dividends thereon and would receive in exchange therefor 44,468,000 shares of the $1 par value common stock of United Gas Corporation.

(7) United Gas Corporation would purchase from Electric Power & Light Corporation for $44,000,000 in cash, its remaining 440,000 shares of second preferred stock having a stated value of $44,000,000 and Electric Power & Light Corporation would also transfer to United Gas Corporation the right of Electric Power & Light Corporation to accumulated and unpaid dividends on such stock. United Gas Corporation would derive the $44,000,000 in cash from the proceeds of its sale of First Mortgage and Collateral Trust Bonds and Electric Power & Light Corporation would use the $44,000,000 received by it to discharge its obligation arising in connection with its acquisition of securities of United Gas Corporation from Electric Bond and Share Company as described in paragraph (2) above.

(8) Electric Power & Light Corporation would surrender to United Gas Corporation as a capital contribution the securities and open account indebtedness of United acquired by Electric Power & Light Corporation from Electric Bond and Share Company as described in paragraph (2) above (exclusive of the 17,310 shares of United Gas Corporation's $7 preferred stock previously surrendered as described in paragraph (3) above) together with option warrants for the purchase of 3,600,040 shares of the common stock of United Gas Corporation.

(9) United Gas Corporation would pass a resolution entitling its common stockholders to two-thirds of a share of common stock for each share of such stock

then held and, in connection therewith, would cause to be transferred from capital surplus to stated capital the sum of $42,613,209 to cover the capital liability to be represented by the additional shares of stock so to be issued and to render such shares fully paid and non-assessable.

(10) United Gas Corporation would use the remaining proceeds of the sale of its First Mortgage and Collateral Trust Bonds together with such additional cash and in its treasury as may be necessary to redeem and cancel $3,460,000 principal amount of publicly held 5% Collateral Trust Gold Bonds of Houston Gas Securities Company, due March 1, 1952, assumed by United Gas Corporation.

(11) United Gas Corporation would amend its certificate of incorporation so as to eliminate the authorization of the $7 preferred stock and the $7 second preferred stock and to reclassify the 106,533,022 shares of then outstanding $1 par value common stock into 10,653,302.2 shares of $10 par value common stock and would exchange the certificates for the new shares of common stock for the certificates for the outstanding common stock on the basis of 1 share of new stock for 10 shares of old stock. Provisions were then made as to fractional shares of stock and for the revocation of outstanding option warrants for the purchase of common stock of United Gas Corporation and for their abrogation and cancellation and non-participation in the plan.

On the 6th day of March, 1944, the Commission issued its Notice of Filing of Section 11(e) Plan and Application or Declaration (or both) under Section 12(c), Order of Consolidation and Notice of and Order for Hearing wherein the said Commission ordered that the proceedings with respect to said plan filed pursuant to Section 11(e) of the Act, and the said application or declaration

(or both) filed by Bond and Share for the use of the said sum of $44,000,000 to be received by it, and the pending consolidated proceeding, hereinbefore referred to (File Nos. 70-314, 70-315, 59-21, 4-33) be consolidated to the extent of consideration by the Commission of the issues involved, and the record in the pending consolidated proceedings be incorporated in the consolidated proceedings directed under the order of March 6th, 1944 (R. 13).

The said order of the Commission dated the 6th day of March, 1944, ordered that a hearing be held in the consolidated proceeding on the 4th day of April, 1944, before one of its Trial Examiners and that all persons desiring to be heard or otherwise wishing to participate in the proceedings should notify the Commission in the manner provided by its rules of practice, Rule XVII, on or before April 1, 1944 (R. 13); and the said order ordered United Gas, Electric and Bond and Share to give notice of the said hearing to all their security holders (insofar as the identity of such security holders was known or available to them) by mailing to each of said persons a copy of the Commission said Notice and Order for Hearing at his last known address at least 20 days prior to the date of the said hearing (R. 15):

The Commission in its order dated March 6th, 1944, provided (R. 13):

> "IT IS FURTHER ORDERED that without limiting the scope of the issues presented in the consolidated proceedings particular attention would be directed at the hearings to the following matters and questions in addition to those stated in the order of this Commission referred to above, dated May 31, 1941:
>
> 1. Whether the Plan as submitted or as hereafter modified is necessary to effectuate the provisions of Section 11(b) of the Act.
>
> 2. Whether the proposed plan as submitted or as hereafter modified is fair and equitable to the persons affected thereby.

3. Whether the proposed acquisition of shares of its preferred stocks by Bond and Share, and the method proposed therefor, is appropriate and in the public interest and in the interest of investors, and in conformity with the standards of Section 12(c) of the Act.

4. Whether, if the transactions proposed are authorized by the Commission, it is appropriate in the public interest and in the interest of investors and consumers that any terms and conditions be imposed in connection with such authorization and, if so, what such terms and conditions should be.

5. Whether the fees and expenses proposed to be paid in connection with the consummation of the Plan and all transactions incidental thereto are for necessary services and are reasonable in amount.

6. Whether the Commission shall, in accordance with the petition of the parties to the Plan, take and exercise jurisdiction to fix and determine the amounts of the payments, if any, to be made by United or Electric to the plaintiffs or their attorneys in the legal proceedings specifically enumerated in the Plan, by way of reimbursement or disbursements or allowances for legal service and, if so, what action it should take in the exercise of such jurisdiction.

7. Whether the accounting entries in connection with the proposed transaction are in conformity with the standards of the Act and Rules promulgated thereunder.

8. Generally, whether the proposed transactions are in all respects in the public interest and in the interest of investors and consumers and consistent with all applicable requirements of the Act and Rules thereunder."

Pursuant to the said order of the Commission dated the 6th day of March, 1944, as aforesaid, petitioner received by mail a copy of the said order of the Commission together with a copy of the plan and a copy of the letters with respect thereto which were being sent by the said Bond and Share, Electric and United Gas, to their respective stockholders. Pursuant to the order of the Commission and the applicable provisions of the Act and the Rule of the said Commission purporting to have been promulgated thereunder, petitioner filed with the said Commission his application for intervention in the said consolidated proceedings which said application contained the following statements by petitioner after stating in substance many of the facts hereinbefore referred to as to the matters involved (R. 15):

> "It was deponent who strenuously objected to the proposed subordination of the obligations due Electric Bond and Share Company from United Gas Corporation, as hereinbefore described, and who succeeded in stopping such proposed subordination.
>
> At the request of Electric Bond and Share Company, on September 21, 1943, a hearing was held in said consolidated proceeding for the purpose of taking the testimony of Ralph B. Feagin, who was the active president of the United Gas Corporation from June 3, 1930 until the spring of 1933, and testified at great length as to transactions between Electric Bond and Share Company, the United Gas Company, and the United Gas Corporation resulting in the present indebtedness of the United Gas Corporation to the Electric Bond and Share Company other than $2,000,000 loan. It is deponent's opinion that the said testimony of the said Feagin uncontradicted in the record is conclusive proof of the absolute validity of the said present indebtedness of the United Gas Corporation to the Electric Bond and Share Company.

On the 21st day of September, 1943, the said consolidated hearing was *again* closed and although deponent requested permission of the Securities and Exchange Commission shortly thereafter to argue the matters, deponent was informed in substance that no determination had been made as to the procedure to be followed in this matter. At no time prior to the 6th day of March, 1944, was any order made by the Commission as to the matters which had been the subject matter of the said consolidated proceeding determining the same insofar as the said Commission had any jurisdiction, but on the contrary in apparent continuation of the efforts of the staff of the Commission to unjustly and illegally, in deponent's opinion, prevent payment of what deponent is fully satisfied is the absolute and unqualified obligations of United Gas Corporation to Electric Bond and Share Company, it now appears that various discussions have been held by the staff of the Commission with officers of the Electric Bond and Share Company, Electric Power & Light Corporation and United Gas Corporation, as a result of which there has been filed with the Commission a plan joined in by United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company, wherein among other things it is contemplated in some wholly indirect and what would appear to be detrimental manner, that Electric Bond and Share Company receive $44,000,000 for its holdings of $53,365,000 of debt securities of United Gas Corporation, 17,310 shares of $7 preferred stock, 752,666 shares of common stock and option warrants to purchase 151,005 shares of common stock, of the United Gas Corporation. The securities other than the debt securities on March 6th, 1944, had a current market value of $3,900,000. If such a proposed transaction is consummated, it will result in the reduction of surplus of the Electric Bond and Share Company of $23,770,000.

* * * * * * * * * *

It is deponent's opinion not only that this proposed plan is in its entirety highly objectionable to Electric Bond and Share Company, in that it contemplates what deponent considers the making of a gift by Electric Bond and Share Company of assets having a present value in deponent's opinion of approximately $13,000,000; but in addition the mechanics of the proposed plan are so highly detrimental to Electric Bond and Share Company and its stockholders, that the grave legal problem will arise as to the right of Electric Bond and Share Company's officers and directors to permit United Gas Corporation to purchase 440,000 shares of the second preferred stock of United Gas Corporation for the sum of $44,000,000. The next substantial question of law presented would be what right legally the Electric Power & Light Corporation and its officers and directors have to take $44,000,000 acquired by that company and turn the same over to Electric Bond and Share Company for certain assets of that company which it is contemplated to surrender to United Gas Corporation. If deponent was of the belief that the so-called master minds who have been obviously responsible for the creation of this plan, would alone sustain the losses which deponent is firmly convinced would arise thereby, deponent might look at the matters in a different light, but since deponent realizes that only Electric Bond and Share Company and its stockholders are the real victims of the activities of the staff of the Securities and Exchange Commission and acquiesced in by the management of the Electric Bond and Share Company under the proposed plan, deponent is determined to prevent such occurrences.

The proposal of Electric Bond and Share Company to use $44,000,000 in purchasing on the New York Curb Exchange its preferred stock, when at the present time it has unexpended approximately

$10,000,000 in cash and securities which the Commission authorized for such use, is too absurd to even be the subject matter of any comment. This merely illustrates again the obvious determination of the management of Electric Bond and Share Company not to employ the customary method of tenders even though the preferred stocks of the company are presently selling above 90. The earned surplus of the company is being continuously substantially reduced as a result of payment of preferred dividends and yet the management with the approval of the Commission, heretofore given, continues to employ only purchases on the New York Curb Exchange which in deponent's opinion is most detrimental. The plan recites that Electric Bond and Share Company joins in the said plan upon the further condition that the Commission, concurrently with or prior to its approval of the plan, issues its order making effective the declaration or application filed by Electric Bond and Share Company, for the use by it of all or any part of the $44,000,000 received by it from Electric Power & Light Corporation in the acquisition and retirement of its preferred stock. It is important to note however that in the declaration, Electric Bond and Share Company also seeks the right to use all or any part of the unexpended portion of such cash in connection with any other plan for the reduction of its outstanding preferred stock which may hereafter be submitted by the company to the Commission and approved by it. Since no such plan accompanies the declaration it is obvious that no such plan can be approved by the Commission as part of the declaration. Therefore it is impossible to conceive how the Commission can on the present declaration of Electric Bond and Share Company approve the same.

To completely present all the objections which deponent has to the above entitled presently consolidated proceeding would cause this affidavit to be extremely voluminous, and deponent therefore is not attempting to state all his objections and wants it specifically understood that the foregoing does not represent all his objections.

Deponent's experience before the Securities and Exchange Commission in the past, and the facts as appearing in this matter, have fully proven to deponent that the only person upon whom deponent can rely in these proceedings to protect his substantial interests as a stockholder of Electric Bond and Share Company is deponent, and that by reason of the aforesaid it is most essential to the interests of deponent that he be permitted to intervene in these proceedings to the extent that he has not been granted participation heretofore, so that he may take the necessary precautions to protect his interests herein."

On the 4th day of April, 1944, a Trial Examiner of the Commission granted to petitioner the right to participate in the said consolidated proceedings which included leave to call and examine witnesses, to offer documentary evidence and to cross-examine witnesses; and petitioner thereafter participated in the said consolidated proceeding before the Commission and cross-examined witnesses produced by the United Gas Corporation, Bond and Share, and Electric and alleged claimants in said consolidated proceedings (R. 20).

During the course of the said consolidated proceedings, petitioner was compelled to make a motion before the Commission on or about April 12, 1944 to set aside rulings of the said Trial Examiner to which exceptions were duly taken and which rulings frustrated the efforts of petitioner to protect his substantial interest and to elicit

the proof of which petitioner sought to elicit to substantiate his objections to the matters which were the subject matter of the said consolidated proceeding, and which rulings it is petitioner's opinion deprived him of his property rights without due process of law in violation of the Constitution of the United States and in violation of the provisions of the Act and its expressed intent and purpose. The said motion is more fully referred to in the petition in the Court below (R. 21).

While in the midst of a cross examination of a witness in said consolidated proceeding, petitioner was directed by the Trial Examiner to cease asking the witness any further questions, to which direction petitioner took due exception and refrained from asking any further questions because of inherent threats that he would be excluded from the hearing if petitioner insisted in propounding his questions. Petitioner made proper application to the Commission to reverse these rulings, and the Commission's determinations with respect to same are also the subject matter of the petition in the Court below (R. 39).

At about 5:30 P. M. on a Friday afternoon, while petitioner was in the midst of cross-examining a witness in said consolidated proceeding, the hearing was recessed until 8 P. M. during which recess petitioner became seriously ill, requested an adjournment until the following Tuesday and was compelled to immediately leave the hearing room without waiting for the Trial Examiner's ruling. The following Monday, petitioner learned that the Trial Examiner on the preceding Friday night, when petitioner became suddenly ill as aforesaid, denied petitioner's request for the short adjournment, permitted the termination of the incomplete cross-examination of the witness theretofore commenced by petitioner, as aforesaid, permitted other witnesses to be examined in petitioner's absence, adjourning the hearing late that evening to the next day, Saturday, when again witnesses were examined and cross-examined in petitioner's absence due to his illness as

aforesaid. Petitioner thereafter sought relief from the Commission with respect to said Trial Examiner's rulings, as hereinafter referred to, and these matters are also the subject matter of the petition in the Court below (R. 39).

On the subsequent oral argument before the Commission, petitioner opposed the proposed transaction wherein Electric Bond and Share Company contemplated selling to Electric Power & Light Corporation for the sum of $44,000,000., assets consisting of claims against United Gas having a value of approximately $56,665,000., which said $44,000,000 it was intended was to be received by Electric from United Gas by the latter purchasing from Electric 440,000 shares of $7 second preferred stock of United Gas for the sum of $44,000,000., which would be part of the proceeds of the sale of the $100,000,000 bond issue by United Gas. Petitioner also objected to the use of the $44,000,000 for the purchase of any second preferred stock of Electric. Petitioner further objected to the proposal of Bond and Share that it only use the open market as a place to purchase its preferred stock instead of also including tenders as a means of such acquisition. On said argument petitioner questioned the jurisdiction of the Commission with respect to the proposed plan of United Gas under Section 11 of the Act since said company's principal business is that of a public utility company. This matter is more fully referred to in the petition in the Court below (R. 41).

The Commission's order of September 7, 1944 (Appendix A) approved the said plan of United Gas, ordered Commission counsel to make application forthwith on behalf of the Commission to an appropriate District Court pursuant to sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the plan; further ordered that the Commission order shall not be operative to authorize the consummation of any of the transactions proposed in the plan until an appropriate District Court shall, upon application of Commission, enter an order en-

forcing the plan approved; and permitted the declaration of Bond and Share with respect to the acquisition of its preferred stock by use of the said sum of $44,000,000 to become effective, subject to the terms and conditions specified in said order (R. 62-71).

Petitioner on September 20, 1944 sought review of the said Commission order and for mandatory relief as provided in Section 24(a) of the Act (R. 1-54).

The stockholders of Bond and Share by the said order of the Commission have been deprived of approximately $13,000,000. The petitioner personally has sustained a loss of approximately $25,000.

On September 8th, 1944 the Commission filed with the United States District Court for the District of Delaware a petition which requested among other things an order approving the plan as fair and equitable and as appropriate to effectuate the provisions of Section 11(b) of the Act (R. 72-79). The District Court on September 8th, 1944 made an order (R. 80-82) directing a hearing on September 29th, 1944 with respect to said petition on which day petitioner appeared before said District Court and objected to the jurisdiction of the Court pending the hearing and determination of the review proceeding in the Circuit Court, Second Circuit. The District Court denied said application and proceeded with the petition of the Commission. The Commission offered no proof in support of its petition other than the record of the Commission which was objected to by petitioner and received by the Court over petitioner's objections. Thereafter petitioner sought to call a witness in support of his objections before the said District Court to which very strenuous objections were made and after almost two hours of oral argument petitioner was permitted to have his witness sworn. A half hour thereafter the proceeding was adjourned until October 3rd, 1944.

On October 2nd, 1944, the Commission made its motion before the Court below to dismiss petitioner's petition for

review of the Commission's order dated September 7th, 1944 on the grounds that the order of the Commission provides that it shall not be operative to authorize the consummation of any transactions proposed in the plan until an appropriate District Court shall, upon application of the Commission, enter an order enforcing the plan so approved; that such an application had been made to the District Court, as aforesaid, and that by reason thereof, the Commission contended that the Circuit Court under Section 24(a) of the Act could not review the order of the Commission but that the petitioner was compelled to seek a review of the Commission's order in the District Court in the so-called enforcement proceedings, and to resort to appeal from any order of the District Court under Section 225 of the Judicial Code (R. 55-85). Petitioner opposed this motion and contended that the only Court which has jurisdiction under the Act to review the order of the Commission and to grant a petitioner mandatory relief as provided in Section 24(a) of the Act, is the Circuit Court of Appeals (R. 86-93).

On October 3rd, 1944 on reconvening of the said hearing in the District Court, the District Judge directed over objections of this petitioner, that his witness withdraw from the witness stand without being permitted to answer any further questions and the District Court refused petitioner the right to have other witnesses present in the courtroom, to be sworn, and then directed that the hearing be closed.

On October 24, 1944, the lower Court rendered its opinion (R. 93-100) granting the motion of the Commission to dismiss the petition of the petitioner to review the Commission order stating (R. 100):

> "We conclude, therefore, that petitioner must be referred to the District Court for the District of Delaware for the protection of such rights as he may have in the premises, and that the motion to dismiss the petition for review must be granted. The petition for review is, therefore, dismissed."

The Questions Presented

1. Does the immediate commencement by the Commission of a statutory District Court proceeding at the request of declarant companies to obtain a court order enforcing the plan approved by a Commission order as provided in Section 11(e) of the Act, deprive a Circuit Court of statutory jurisdiction under Section 24(a) of the Act to review the said order of the Commission on the petition of an aggrieved investor and to grant to such petitioner the mandatory relief provided for in said Section 24(a)?

2. Is not the Commission's order to the extent that it approved the declaration of Bond and Share for the use of the $44,000,000 in the acquisition of its preferred stock and the terms and conditions of said order applicable to said acquisition solely reviewable in the Circuit Court of Appeals as provided in said Section 24(a) of the Act?

Specification of Error to be Urged.

The Circuit Court of Appeals for the Second Circuit erred in holding that it had no jurisdiction under Section 24(a) of the Act to review the order of the Commission and to grant the mandatory relief prayed for in the petition.

Reasons Relied on for Grant of Writ

(1) Whether an aggrieved investor affected directly and adversely by an order of the Commission approving a plan under Section 11(e) of the Act and authorizing the use of $44,000,000 of his company's assets, can be deprived of his statutory authority under Section 24(a) of the Act to have a Circuit Court of the circuit wherein he resides or has his principal place of business, review the said Commission order and grant the mandatory relief therein provided for, by the Commission immediately after entering its said order applying to a distant District Court for an order, at the request of the declarant companies, enforcing and carrying out the said plan, is a vitally important Fed-

eral question drastically affecting the interests of millions of investors scattered all over the United States who have billions of dollars invested in companies subject to the regulations of the Act, is a question which seriously involves the administration of the Act, has not been but should be settled by this Court.

(2) The Court below in dismissing the petition for review on the ground that the institution of the District Court proceedings by the Commission, at the request of the declarant companies, for an order under Section 11(e) enforcing and carrying out a plan approved by the Commission order, ousted the Court below of its jurisdiction under Section 24(a) of the Act to review the said Commission order, has misconstrued the statutory provisions of Sections 24(a) and 11 and their intent and purport, and the decision of the Court below is in conflict with the decisions of this Court and the decisions of other Circuit Courts of Appeals.

(3) A real question of deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States is presented in the instant case, as the petitioner by the decision below has been denied judicial review of an administrative order which deprives him of substantial property.

Wherefore, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, to the end that the above cause may be certified to and reviewed and determined by this Court and that the judgment of said Circuit Court of Appeals in the above-entitled cause may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Samuel Okin,
Attorney for Petitioner.

May 5th, 1945.

BRIEF IN SUPPORT OF PETITION

[For index, table of cases, table of statutes, reference to opinion below, jurisdictional statement, statement of the case and specification of error, reference is made to the petition.]

I. The immediate commencement by Commission of Statutory District Court proceeding at request of declarant companies to obtain court order enforcing a plan approved by order of Commission as provided in Section 11(e) of Act, does not deprive a Circuit Court of Statutory Jurisdiction under Section 24(a) of Act to review said Commission order on petition of aggrieved investor and grant mandatory relief as provided in said Section 24(a).

The Court below, it is submited, misconstrued the provisions of Sections 11 and 24(a) of the Act and erred in dismissing the petition of an aggrieved investor to review the order of the Commission purporting to be made pursuant to Section 11(e) of the Act approving a plan filed by United Gas and joined in by Bond and Share and Electric.

On September 7th, 1944 the Commission made its order approving said plan and on September 8th, 1944, pursuant to a request of said companies contained in the said plan, the Commission filed a petition in the District Court of Delaware for an order enforcing said plan under Sections 11(e) and 18(f) of the Act.

The petitioner filed a petition in the Court below to review the order of the Commission and for certain mandatory relief as authorized by Section 24(a) of the Act.

The Commission moved to dismiss the petition because of the proceedings pending in the District Court, which motion the Court below granted.

In dismissing the petition, the Court below has deprived petitioner of the only statutory review of the Commission order which is provided for by the Act. Only Section 24(a) of the Act authorizes any review of a Commission order and no such review can be obtained in any proceeding under Sections 11(e) and 18(f) for an order enforcing any such plan approved by the Commission when such order is requested by declarant companies.

The District Court in any such enforcement proceeding has no statutory authority to review the Commission order or to grant the mandatory relief provided for in Section 24(a) of the Act, but can only make an order enforcing and carrying out the terms and provisions of such plan, if, upon such application and after notice and opportunity for hearing, it finds that such plan is fair and equitable and appropriate to effectuate the provisions of Section 11, and can assert such further equitable jurisdiction as provided in said Section 11(e).

The determination of the Court below, it is submitted, is apparently predicated upon the theory that the filing of the petition for review of the Commission order created a conflicting situation with the proceedings pending in the District Court requiring an interpretation of the Act to the extent that no review of the Commission order approving the plan could be obtained in a Circuit Court as provided in Section 24(a) of the Act where the Commission had instituted at the request of the companies, a District Court proceeding for an order enforcing the plan and carrying out its provisions.

The provisions for review of Commission orders under Section 24(a) and the proceedings in the District Court for the enforcement of a voluntary plan of reorganization, serve entirely different purposes and any interpretation that they conflict is predicated on a misconstruction of the Act.

The Court below said (R. 95, 96, 97):

"The motion to dismiss is based on the contention that jurisdiction to review the plan and all objections to it is now vested in the United States District Court for the District of Delaware, wherein the Commission filed a petition for enforcement of the plan on September 8, 1944.

* * * * * *

The Commission relies, however, on the provisions of section 11(e) of the same Act, 15 U. S. C. A. sec. 79k(e), which, after giving jurisdiction to the Commission to pass upon a plan for the reorganization of any subsidiary company of a registered holding company, states that the Commission may, in accordance with section 18(f) of the Act, 15 U. S. C. A. sec. 79r(f), apply to the district court of the United States for the proper district to 'enforce and carry out the terms and provisions of such plan'.

* * * * * *

It is the Commission's contention that the general provision for review of Commission orders at the behest of a single person must yield to the particular authority given a single district court to pass upon the provisions of a plan as fair and equitable and to enforce it. As supporting this view, it refers to not only the statute above quoted, which makes the approval of the district court a condition precedent to enforcement of the plan but also the terms of its own order making the plan 'operative' only upon the entry of an enforcement order by the appropriate district court. Hence it says that both by fair interpretation of the statute and by express terms of the order of which review is sought, it is as yet merely interlocutory, lacking the finality necessary for immediate review, and further that petitioner does not now show himself 'aggrieved' by any order of the Commission. And if

and when the district court, which is now conducting hearings, does enter an enforcement order, then all parties in interest will have their usual rights of appeal therefrom.

The broad terms of review accorded by section 24(a) of the Act of course show a general legislative intent to give parties aggrieved by Commission orders the opportunity to present their case for review to the circuit court of appeals of their own circuit, and there is no exception in terms for orders which must be brought for enforcement to a district court. Thus, the situation here presented appears to be one not directly contemplated by the law makers. It seems clear, however, that a rational interpretation of the entire statute must support the Commission's view if all parts of it are to be given due weight and application, and a consistent and workable scheme of enforcement, as well as of review is to be applied. The provisions of section 11 compel full review of an order such as this in a district court for all parties in interest, thus making limited reviews for single parties in interest in other courts quite intolerable for the conflict in jurisdiction which must result; and the broad scope of review stated in section 24 becomes in terms inapplicable because of the interlocutory nature of the Commission's action in the circumstances."

In referring to the provisions of 11(e) of the Act, this Court said in *Securities and Exchange Commission* v. *Chenery Corp., et al.*, 318 U. S. 80, 91, 94:

"The Act vests in the officers and directors of a holding company registered under the Act broad powers as representatives of all the stockholders. Besides the Commission, only the management can initiate a proceeding before the Commission to simplify the corporate structure and to effect a fair and equitable dis-

tribution of voting power among security holders. Only the management can amend a plan under secs. 7 and 11(e), and this it may do at any time; only the management can withdraw the plan, and this too it may do at will; and even after the Commission has approved a plan, it cannot be carried out without the consent of the management.

* * * * * *

Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us."

In the *Chenery* case (*supra*) the Commission made an order approving a modified plan filed under Section 11(e) of the Act which order was reviewed under Section 24(a) of the Act on the petition of an aggrieved person and the resulting order of the appellate court was thereafter reviewed by this Court. In that case the company involved did not request the Commission to institute any proceeding for an order enforcing and carrying out said modified plan.

In *Marquis and Company* v. *Securities and Exchange Commission*, 134 F. (2d) 265, 822 (C. C. A. 3, 1943), a petition was filed by an aggrieved person under Section 24(a) of the Act to review the order of the Commission approving a plan filed under Section 11(e) for the reorganization of the Columbia Oil and Gasoline Corporation. In that case the plan of reorganization did not request the Commission to institute any proceeding in the District Court to obtain an order of the Court enforcing the same but the company endeavored to consummate the plan by obtaining voluntary approval of the stockholders. After the Commission filed its certified record as provided in Section 24(a) of the Act with the said Third Circuit, the companies requested the Commission to institute a District Court proceeding for an order enforcing and carrying out the said plan under Sections 11(e) and 18(f), which the Commis-

sion did, and thereafter the Commission moved before the Circuit Court to stay its proceedings pending action by the District Court, which motion was denied without opinion.

In *City National Bank & Trust Co.* v. *Securities and Exchange Commission*, 134 F. (2d) 65 (C. C. A. 7) and *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. (2d) 274 (C. C. A. 2), certiorari denied, 318 U. S. 786, the Courts reviewed orders of the Commission approving plans filed under Section 11(e) when petitions were presented by aggrieved persons under Section 24(a) of the Act. In these cases the plans as approved by the Commission were apparently consummated without resorting to any enforcement proceeding as authorized by said Section 11(e).

The only construction which can be placed upon the opinion of the Court below is that the institution of the enforcement proceedings and the insertion in the Commission order that (R. 66):

> "IT IS FURTHER ORDERED that this order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved."

have ousted the Circuit Court of jurisdiction of a petition duly filed under Section 24(a) of the Act. It would indeed be anomalous if the Commission could, by inserting in its order an unnecessary provision (supra) and thereafter instituting District Court proceedings at the voluntary request of the declarant companies, thereby circumvent the statutory provisions for review of Commission orders and thus prevent the use of Courts by Congress to vindicate the public interest in the statute, protect the substantial interests of investors and curb any excessive assertion of statutory power by the Commission.

Section 11(e) authorizes the Commission to make an order approving a voluntary plan filed thereunder if, after notice and opportunity for hearing, the Commission finds such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan. The Commission has no authority under this subsection to make any conditional order making its approval of the plan subject to any order of a District Court enforcing any such plan. The attempt to insert in the Commission order any such superfluous provisions is not only wholly ineffectual but obviously intended solely for the purpose of circumventing the statutory provisions for review of Commission orders under Section 24(a) of the Act and the granting of the mandatory relief as provided in said section. The insertion by the Commission in its order of the aforesaid wholly unnecessary attempted conditional provisions, has absolutely no statutory significance and should be treated as though they had never been inserted in said Commission order. When the Commission saw fit under Section 11(e) of the Act to approve the plan, such approval expended its statutory power and the insertion of the alleged conditional provisions in no way made the said Commission order interlocutory. The order of the Commission was in all respects final and required no further action on the part of the Commission. The fact that any company in attempting to consummate the plan as approved by the Commission, found it necessary at any time either before or after such Commission approval to request the Commission to apply to a District Court for an enforcement order as provided in Section 11(e), does not in any way change the finality of the Commission order.

The decision of the Court below resulted from its acceptance of the Commission contention that under Section 11(e) the approval by a District Court of the plan filed thereunder is a condition precedent which makes the order of the Commission, particularly where it contains such conditional

provisions, merely interlocutory and not reviewable under Section 24(a), and aggrieved persons must resort to the District Court proceedings to protect their interests. The contentions of the Commission are without basis in statute and the lower Court erred in accepting the same.

As this Court said in the *Chenery* case (*supra*), the Act authorizes a management of a company to withdraw at will, a plan filed by it under Section 11(e) even after the Commission has approved it and this plan cannot be carried out without the consent of the management.

Section 11(e) does not require that an order of the Commission approving a plan filed thereunder is in any manner subject to a subsequent enforcement order of a District Court. Any plan filed under Section 11(e) does not require that the company request the Commission to obtain an enforcement order.

The only interpretation which can properly be placed upon Section 11(e), it is submitted, is that any plan approved by the Commission may thereafter be voluntarily consummated by the act of the stockholders of the company or other persons affected thereby, and that in the event that the management of the company find that they are unable to obtain the voluntary approval of such plan by the persons affected thereby, the company involved is permitted by statute to request the Commission to apply for an enforcement order from a District Court as provided in said Section 11(e).

It is thus obvious that the subsequent proceeding in a District Court as provided in Section 11(e) does or does not take place dependent solely upon whether the persons affected by such plan accept the same voluntarily or refuse to do so. In any event, however, the subsequent proceeding in the District Court is wholly distinct from the proceedings before the Commission, Congress merely having provided that if the stockholders or other persons affected re-

fuse to approve the plan after the Commission has made its order doing so, a Court is empowered to conduct a hearing as to whether it will compel the persons affected by such plan to abide by the same and carry it out.

Thus it is apparent that Congress has provided two separate and distinct steps under Section 11(e) of the Act with respect to a voluntary plan filed by a company for reorganization, neither one of which is dependent on the other, except that the proceedings in a District Court can only take place after the Commission has made its order approving the plan. Even the findings to be made by the Commission and the Court are different under Section 11(e). Under this Section the Commission is empowered to make an order approving the plan if it finds such plan *necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected thereby; whereas* the Court under said Section is authorized to make an order enforcing and carrying out the terms and provisions of such plan, if upon application by the Commission, at the request of the company, it shall approve said plan *as fair and equitable and as appropriate to effectuate the provisions of section 11.*

Thus while the Commission may approve the plan if it finds same fair and equitable and necessary to effectuate the provisions of subsection (b), the Court must not only find that the plan is fair and equitable but that it is appropriate. While the Commission thus may think the plan necessary, the Court while agreeing with the Commission that it is necessary must nevertheless find that it is appropriate. The terms "necessary" and "appropriate" are not synonymous.

It is important to note that the Court below apparently disregarded the important fact that the Order of the Commission not only approved the plan filed by United Gas and joined in by Bond and Share and Electric, but also approved the use of the $44,000,000 in cash contemplated to

be received by Bond and Share and intended by it to be used in the acquisition of its preferred stock, and in approving such use the Commission order attaches conditions detrimental to investors who own stock in Bond and Share.

Assuming, for the purpose of argument, that an aggrieved person cannot obtain a review under Section 24(a) of the Act of an order of the Commission approving a plan filed under Section 11(e), it is wholly impossible to understand upon what construction of the Act, any one can contend that an aggrieved person is similarly to be deprived of a review under said Section 24(a) of the order of the Commission approving a Declaration of Bond and Share under Section 12(c) with respect to said $44,000,000, as aforesaid, merely because the Commission directed a consolidated proceeding, as aforesaid, and thereafter made a consolidated order. Certainly the matters involved are wholly distinct.

The lower Court apparently concluded that in the proceedings in the District Court, an aggrieved person can obtain a review of the Commission order and the other relief provided for in Section 24(a). It is impossible, it is submitted, to justify any such conclusions upon an examination of the provisions of the Act with respect to the jurisdiction of the District Court. Its sole authority is to make an enforcement order under certain circumstances. The Act does not empower the District Court to set aside, modify, affirm, in whole or in part, the Commission order as provided in Section 24(a), nor does it empower the District Court to grant the mandatory relief as provided in Section 24(a) or the stay as provided in Section 24(b).

This Court is empowered to review upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347) the order of the Circuit Court under Section 24(a) affirming, modifying or setting aside, in whole or in part, any such order of the Commission before the Court for re-

view. There is no such provision in the Act with respect to the District Court but only as to the Circuit Court.

The conclusion of the lower Court that because the provision appears in subsection (b) of Section 11, i. e.:

"Any order made under this subsection shall be subject to judicial review as provided in section 24."

and such provision does not appear in subsection (e) of Section 11 and therefore any Commission order under subsection (e) is not reviewable under Section 24(a), is not tenable under any construction of said Sections 11 and 24(a).

Under Section 11, the Commission was directed under subsection (a) thereof to make certain examination; under (b)(1) to require the limitation of certain operations; under (b)(2) to simplify a holding company structure or to fairly and equitably distribute voting power; under subsection (c) the company was given one year to comply with the order made under subsection (b) with a possible extension of another year; under subsection (d) the Commission was authorized to go to Court to compel compliance with its order under subsection (b); under subsection (e) a company was authorized to file a plan for voluntary compliance with the Commission's order under subsection (b) or for voluntary compliance with said subsection (b) in advance of any such order of the Commission; subsection (f) refers to the appointment of a receiver or trustee for any registered holding company in any proceeding in a Court of the United States under Section 11 or otherwise, or with respect to any subsidiary; subsection (g) refers to solicitation of investors.

It is apparent from the foregoing that subsections (c), (d) and (e) are interwoven with subsection (b) and it is impossible, it is submitted, to so construe subsection (e) so as to conclude that only orders under subsection (b) shall be reviewable under Section 24(a) and not orders under subsection (e). The construction of the lower Court to the contrary, it is submitted, was error.

Likewise, it is submitted, the conclusions of the lower Court that because of the colloquy in Congress respecting Section 77 of the Bankruptcy Act relative to the relationship thereunder of the Interstate Commerce Commission and the District Court wherein the Interstate Commerce Commission acts in an advisory capacity to the District Court, that therefore the Securities and Exchange Commission under Section 11(e) of the Public Utility Holding Company Act of 1935 acts in a similar capacity and that its orders under subsection (e) are not reviewable under Section 24(a), is, it is submited, without foundation in the Act. The Securities and Exchange Commission in making its order under subsection (e) of Section 11 does not act in an advisory capacity similar to the action of the Interstate Commerce Commission in making its report to a District Court under section 77 of the Bankruptcy Act relative to a railroad which is the subject matter of a bankruptcy or reorganization proceeding in a District Court. Under the Bankruptcy Act, the role played by the Interstate Commerce Commission is not the same as that authority granted to the Securities and Exchange Commission under Section 11(e) of the Public Utility Holding Company Act of 1935.

The reference by the lower Court in its opinion to the debate with respect to subsection (f) does not justify, it is submitted, its conclusion that the Act does not provide for review under Section 24(a) of orders of the Commission made under subsection (e) of Section 11. The debate with respect to subsection (f) dealt solely with the question as to whether the provisions of subsection (f) would interfere with the jurisdiction of the District Court with respect to the appointment of a receiver or trustee, and was not intended to indicate any legislative intent that orders of the Commission under subsection (e) should not be reviewable under Section 24(a).

It is submited that the conclusion of the lower Court, that the order of the Commission is reviewable by the district court under Section 11(e) is without any basis in the

Act and that the jurisdiction of a district court in any enforcement proceeding under subsection (e) of Section 11 is limited wholly to that subsection.

The further conclusion of the lower Court that an aggrieved person must forego the statutory right under Section 24(a) of filing his petition in the Circuit Court where he resides or has his place of business, and must go to some distant Court to protect his interests and those of the other investors involved, it is submited, is also contrary not only to the expressed intent of Congress, but also to the decision of this Court in construing similar provisions in the Communications Act of 1934, and the legislative history with respect to same.

In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 15, this Court said:

> "It is urged that the orders reviewable under section 402(a), as to which the power to grant stays is undeniable, are intrinsically different from those reviewable under section 402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under section 402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under section 402(b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in

situations where the Commission's order arose out of a proceeding not instituted by the licensee.''

The legislative history of the Communications Act of 1934, referred to in the foregoing decision (*Scripps-Howard* case, *supra*) with respect to similar review provisions is of importance.[1]

The legislative history of the Public Utility Holding Company Act of 1935 and its expressed intent and purpose (sec. 1), makes it very apparent that when Congress provided in Section 24(a) of the Act that an aggrieved person might seek review of a Commission order in the Circuit

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[1] Remarks of Senator Dill in charge of the measure in the Senate, 78th Cong. Rec. 8825, 73rd Cong. 2nd Sess. in referring to Section 402 of the Communications Act of 1934:

"I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court. A station owner who lives in the Rocky Mountain area, or who lives in the far West, and who is compelled to come to the District of Columbia to prosecute his appeal, finds himself faced with the expense of from $400 to $500 for the mere trip of coming here, an equal amount for his attorney, if he brings one, and then the attorney fees in addition. I say of personal knowledge that some of the station owners have found it almost impossible to finance appeals in that way. So we provide that where the decisions of the Commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or permit, or whatever it may be, comes to the Commission and asks for a change in his license or asks for a new license, or asks for something to be done by the Commission, then if the Commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia.

In other words, if the station owner has money enough to come here in the beginning to prosecute his case before the Commission, it is fair to assume that he has money enough to continue the appeal here."

Court in the circuit in which such aggrieved person resides or has his principal place of business, that Congress was being just as solicitous in 1935 with respect to the investors scattered all over the United States whom Congress so diligently was seeking to protect, as it was in 1934 when it made appeals convenient for stations.

II. The Commission's order to the extent that it approved the declaration of Bond and Share for the use of $44,000,000 in the acquisition of its preferred stock and attached certain terms and conditions thereto can only be reviewed under Section 24(a) of the Act.

Bond and Share filed a separate application for the use of the $44,000,000 which it was to receive from United Gas under the plan hereinbefore referred to. The Commission consolidated the hearing with respect to this declaration with the hearing with respect to the plan and thereafter made its consolidated order (Appendix A), which was the subject matter of the petition in the Court below, wherein the Commission approved the separate declaration of Bond and Share.

The lower Court in its opinion makes no reference to this phase of the order.

When the plan was filed by United Gas and joined in by Bond and Share and Electric, and request made therein by said companies that the Commission apply for an enforcement order with respect to the plan in the event that the Commission approves the plan, Bond and Share conditioned its approval of the plan upon the approval by the Commission of the separate declaration of Bond and Share to use the $44,000,000 which it was to receive under the plan. But this application for the use of the $44,000,000 was a separate and distinct application bearing a separate file number (File No. 70-868), and purported to be filed by Bond and Share under Section 12(c) of the Act.

Obviously any objections which petitioner had to the order of the Commission with respect to this application of Bond and Share could only be reviewed by the Circuit Court under Section 24(a) and the District Court in the proceeding under Section 11(e) with respect to the plan of United Gas had no jurisdiction with respect to the said application of Bond and Share approved, as aforesaid, in the Commission order.

The said order of the Commission in approving said application of Bond and Share attached conditions and terms wholly without authority in law and beyond any jurisdiction of the Commission. The petition in the Court below sought to have the order also reviewed to the extent that it contained such provisions (R. 45-46, 53).

That petitioner is a person aggrieved within the provisions of Section 24(a) of the Act has been argued at length before this Court (No. 815, this Term).

It is submited that the lower Court also erred in dismissing the petition to the extent that it sought review as aforesaid, under Section 24(a) of the Act.

Conclusion

It is most important to investors in the United States that the Congressional authority granted to them under Section 24(a) of the Act to seek judicial review in a Circuit Court of the circuit wherein such investors reside or have their principal place of business to review any order of the Commission under the Act must remain inviolate and should not be withdrawn by an erroneous judicial decree.

It is respectfully submitted that the foregoing petition for writ of certiorari should be granted.

Respectfully submitted,

SAMUEL OKIN,
Attorney for Petitioner,
No. 32 Broadway,
New York City.

May 5th, 1945.

Appendix A

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 7th day of September, A. D., 1944.

In the Matter of

UNITED GAS CORPORATION
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY

File No. 70-314

In the Matter of

ELECTRIC BOND AND SHARE COMPANY

File No. 70-315

In the Matter of

ELECTRIC BOND AND SHARE COMPANY
ELECTRIC POWER & LIGHT CORPORATION
UNITED GAS CORPORATION
HOUSTON GAS SECURITIES COMPANY
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY

File No. 59-21

(Public Utility Holding Company Act of 1935 Sections 11(b)(2), 12(b), 12(c) and 12(f))

In the Matter of

INVESTIGATION OF ORGANIZATION AND FINANCING OF UNITED GAS CORPORATION., ETC.

File No. 4-33

(Public Utility Holding Company Act of 1935 Sections 18(a) and 18(b))

ORDER APPROVING PLAN PURSUANT TO SECTION 11(e) PERMITTING DECLARATIONS TO BECOME EFFECTIVE AND GRANTING APPLICATIONS

In the Matter of

UNITED GAS CORPORATION
ELECTRIC POWER & LIGHT CORPORATION
ELECTRIC BOND AND SHARE COMPANY

File No. 54-91

In the Matter of

ELECTRIC BOND AND SHARE COMPANY

File No. 70-868

(Public Utility Holding Company Act of 1935)

United Gas Corporation ("United") having filed with the Commission an application for approval of a Plan, as amended (hereinafter referred to as the "Plan"), pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 (the "Act") and Electric Bond and Share Company ("Bond and Share") and Electric Power & Light Corporation ("Electric") having joined in said Plan with respect to all transactions affecting them provided for therein; and

United, Bond and Share and Electric having requested the Commission pursuant to Section 11(e) of the Act, if it approved the Plan, to apply to a Court in accordance with the provisions of sub-section (f) of Section 18 of the Act to enforce and cary out the terms and provisions of said Plan; and

Bond and Share having filed a declaration under Section 12(c) of the Act seeking approval of the use of all or any part of the cash proceds to be received by it under the Plan for the acquisition and retirement of its preferred stocks and having conditioned its joinder in the Plan upon the issuance of an order of the Commission permitting said declaration under Section 12(c) to become effective; and

United and certain of its subsidiaries having filed a joint application and declaration pursuant to Sections 6, 7, 9(a), 10 and 12 of the Act for approval of a series of transactions incident to the refinancing of United (File No. 70-314), and in connection with the filing of said Plan having filed an amendment to the joint application and declaration to provide for the issuance and sale of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds and the use of the proceeds of such sale for the redemption of its publicly held $7 preferred stock, the purchase of a portion of its outstanding second preferred stock and the redemption of the publicly held 5% Collateral Trust Gold Bonds assumed by United, as contemplated in said Plan and for the issuance and sale by United Gas Pipe Line Company, a wholly-owned subsidiary of United, of $23,000,000 principal amount of its First Mortgage Bonds, all of which will be issued to United in exchange for a like principal amount of United Gas Pipe Line's 6% Debentures owned by United which debentures will be cancelled; and

The Commission having on March 6, 1944 issued its Notice and Order for Hearing on said application and Plan under Section 11(e) on said declaration under Section 12(c) and having directed the consolidation of the proceedings thereon with each other and with a prior consolidated proceeding involving, among other matters, applications and declarations under Sections 6, 7, 9(a), 10 and 12 of the Act for the refinancing of United and proceedings instituted by the Commission under Sections 11(b)(2), 12(b), 12(c), 12(f), 18(a) and 18(b) of the Act (File Nos. 70-314, 70-315, 59-21, 4-33); and

A copy of said Notice and Order for Hearing on March 6th, 1944 having been mailed to all security holders of the applicant (insofar as the identity of such security holders was known or available), notice having been duly given to all interested persons, all persons having been given an opportunity to be heard with respect to all matters per-

taining to said proceedings, public hearings having been held, the staff of the Public Utilities Division of the Commission having prepared and filed a draft of the proposed Findings and Opinion and having recommended its adoption by the Commission, copies of the draft of the proposed Findings and Opinion having been served on all parties and persons who appeared and participated in the proceedings, an opportunity having been afforded to each of them to file a written statement of objections to all or any part thereof, briefs and answering briefs having been filed and the Commission having heard oral argument, and the Commission having this day issued and filed its Findings and Opinion herein; and

United, Bond and Share and Electric having requested that the Commission's order conform to and set forth the recitals specified in Sections 371 and 1808(f) of the Internal Revenue Code as amended;

IT IS ORDERED that the Plan be, and the same hereby is approved subject, however, to the condition that the applicants undertake to pay such fees and reimburse such expenses incurred or to be incurred in connection with said Plan, the transactions incident thereto and the consummation thereof, as are approved, allocated, or awarded by further order or orders of this Commission; and to the further conditions and reservations hereinafter set forth.

IT IS FURTHER ORDERED that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the provisions of sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the Plan.

IT IS FURTHER ORDERED that this order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved.

IT IS FURTHER ORDERED that the declaration of Bond and Share under Section 12(c) with respect to the acquisition of a portion of its outstanding $5 and $6 preferred stocks be, and the same hereby is, permitted to become effective forthwith subject to the terms and conditions prescribed in Rule U-24 and to the further terms and conditions that:

(1) All purchases shall be effected on the New York Curb Exchange except that the company may purchase large blocks of stock otherwise than on said Exchange provided that notice of intention to effect each such purchase together with a statement of the identity of the seller, the price proposed to be paid and any fees or commissions to be incurred in connection therewith shall have been given to the Commission and the company shall not have been informed by the Commission that it intends to issue an order to show cause why such purchase should not be consummated. The company shall not solicit or cause to be solicited the sale of any shares to the company either on or off the said Exchange;

(2) The company shall furnish to the Commission promptly at the end of each week a report showing the number of shares of each class of preferred stock purchased each day during the week, the prices at which they were purchased and the names of the brokers through whom they were purchased;

(3) The company shall include in its quarterly reports to stockholders information as to the total number of shares of each class purchased and the aggregate purchase price for each class;

(4) No purchase shall be made after twelve months from the date of the receipt of the cash under the Plan subject, however, to the right of the company to apply for an extension or extensions of such period;

(5) The company shall advise by letter the holders of record of its preferred stock fully with respect to its in-

tention to make such purchases and the method to be employed and the Commission reserves jurisdiction with respect to the form and contents of such notice and any similar communications;

(6) All shares of preferred stock acquired by the Company pursuant to the present declaration and order shall be retired and cancelled;

(7) The company shall have the right to file substitute or additional programs with respect to the use of all or any portion of the funds which are the subject of the application, and jurisdiction is hereby reserved to require the company to make such filings or to take such other action as may be necessary or appropriate under the provisions of the Act; and

(8) The Commission reserves jurisdiction in its discretion to rescind or modify its order, any such rescission or modification to be applicable to such portion of the cash permitted to be employed for such purchases pursuant to the proposals herein as shall not have been previously expended.

IT IS FURTHER ORDERED that the joint application and declaration of United and the United Gas Pipe Line Company, as amended, with respect to the issuance of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds, under Sections 6, 7, 9(a), 10, 11(b), and 12 of the Act be, and the same hereby is, granted and permitted to become effective, except as to the issues concerning the terms and conditions of the Bonds proposed to be issued and sold by United and United Gas Pipe Line Company and the fees and expenses to be incurred in connection with said proposed issuance and sale as to which matters jurisdiction be, and the same hereby is, specifically reserved, subject, however, to the terms and conditions contained in Rule U-24.

IT IS FURTHER ORDERED that jurisdiction be, and it hereby is, reserved:

(1) To consider, determine and take appropriate action with respect to all issues involved in United Gas Corporation, et al., File Nos. 70-314, 70-315, 59-21 and 4-33, except those disposed of herein;

(2) To entertain such further proceedings, to make such further and supplemental findings and to take such additional action as may be found to be appropriate in the premises in connection with the said Plan and the several transactions incident to the consummation thereof:

IT IS FURTHER ORDERED that the issues, distributions, transfers, and exchanges of securities, and the transactions, specified and itemized below all as provided by the Plan are necessary or appropriate to the integration and simplification of the holding company system of which United is a member and necessary or appropriate to effectuate the provisions of subsection (b) of Section 11 of the Public Utility Holding Company Act of 1935:

(1) The sale and transfer by Bond and Share and the acquisition by Electric for a cash purchase price of $44,000,000 of all the claims in and against United held by Bond and Share as follows: $25,000,000 principal amount of 6% Debentures due 1953 of United Gas Public Service Company assumed by United; 6% demand note in the principal amount of $25,925,000; 6% open account of indebtedness of $2,000,000; 17,310 shares of $7 preferred stock, 752,666 shares of common stock, 151,005 option warrants for the purchase of common stock of United; and $440,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company assumed by United.

(2) The surrender by Electric and the acquisition and cancellation by United of 17,310 shares of $7 preferred stock of United together with all rights to accumulated and undeclared dividends thereon acquired by Electric from Bond and Share in the transaction described in paragraph (1) above.

(3) The redemption and cancellation by United of 432,512 shares of its $7 preferred stock at their redemption

price of $110 per share plus accumulated dividends thereon to the redemption date.

(4) The declaration, issuance and distribution by United of a dividend on its $7 second preferred stock, all of which is held by Electric, of 12,385,520 shares of its $1 par value common stock and the acceptance by Electric of such stock dividend in payment of $12,385,520 of accumulated and unpaid dividends on such stock.

(5) The surrender by Electric and the acquisition and cancellation by United of 444,680 shares of $7 second preferred stock of United together with all rights to accumulated and undeclared dividends thereon and the issuance and delivery to Electric in exchange therefor of 44,468,000 shares of the $1 par value common stock of United.

(6) The sale and transfer by Electric and the acquisition for cancellation by United in exchange for $44,000,000 in cash of 440,000 shares of second preferred stock of United having a stated value of $44,000,000 and together with the right to accumulated and unpaid dividends on such stock.

(7) The payment by Electric of the $44,000,000 received by it in the transaction described in paragraph (6) above to Bond and Share.

(8) The surrender by Electric and the acquisition by United as a contribution to capital of the securities and open account of indebtedness of United acquired by Electric from Bond and Share as described in paragraph (1) above together with option warrants for the purchase of 3,600,040 shares of common stock of United held by Electric exclusive of the 17,310 shares of $7 perferred stock of United previously surrendered as described in paragraph (2) above.

(9) The redemption and retirement by United of $3,460,000 principal amount of 5% Collateral Trust Gold Bonds of Houston Gas Securities Company due March 1, 1952 assumed by United.

(10) The issuance and distribution by United of 42,613,-209 shares of its $1 par value common stock as a common stock dividend of two-thirds of a share of $1 par value common stock on each share of such stock outstanding and the acceptance thereof by the common stockholders of United, and in connection therewith the transfer from capital surplus to stated capital of the sum of $42,613,209 to cover the capital liability to be represented by the additional shares of stock to be issued and to render such shares fully paid and non-assessable.

(11) The issuance and distribution by United of 10,653,-302.2 shares of $10 par value common stock and the transfer and exchange of such shares by United and its common stockholders for the outstanding 106,533,022 shares of $1 par value common stock of United or in exchange for scrip of United.

(12) The issuance, transfer and exchange of scrip of United and the issuance and transfer of $10 par value common stock of said company in exchange therefor to the extent necessary to carry out the plan.

(13) All other transfers and exchanges of common stock and scrip of United which are required in order to carry out the Plan.

(14) The revocation, abrogation and cancellation of all outstanding option warrants for the purchase of common stock of United.

(15) The issuance and sale by United of $100,000,000 principal amount of First Mortgage and Collateral Trust Bonds, and the issuance by United Gas Pipe Line Company of $23,000,000 principal amount of its First Mortgage Bonds, subject to the reservations and conditions hereinbefore set forth.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Appendix B.

Statutes Involved

The Sections of the Public Utility Holding Company Act of 1935 (U. S. C., title 15) which are pertinent on this application, are as follows:

Section 1. (a).....(1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States;.....

(b).....it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers.....

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section,.....

Section 2.(a)(5) "Public-utility company" means an electric utility company or a gas utility company.

Section 2.(a)(16) "Security" means any note, draft, stock, treasury stock, bond, debenture,.....

Section 6 prohibits the issuance or sale of the securities of a registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, except in accordance with a declaration effective under section 7 of the Act and with the order under said section permitting such declaration to become effective.

Section 7 provides for the filing of declarations by registered holding companies and their subsidiaries in respect of security transactions and the following provisions appear in subsection (c).

> The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) Such security is.....(B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; .....; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

Section 9 makes it unlawful for registered holding companies and their subsidiary companies and certain persons to acquire securities and utility assets and other interests without the approval by the Commission under Section 10.

Section 10 provides for the approval of the acquisition of securities and utility assets and other interests by the Commission by the filing of an application and provides:

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

Section 11(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding company system of which such a company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* .....

(2) To require by order, after notice and opportunity for hearing, that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

Section 11(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such

extension necessary or appropriate in the public interest or for the protection of investors or consumers.

Section 11(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b) the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

Section 11(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any

subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the commission, the assets so possessed.

Section 11(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making such appointment. In no proceeding under this

section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court .....

Section 12(c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Section 18(b) The Commission upon its own motion or at the request of the State commission may investigate, or obtain any information regarding the business, financial condition, or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding company system.

Section 18(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United

States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond .....

Section 24(a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code as amended (U. S. C., title 28, secs. 346 and 347).

Section 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", ap-

proved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

Section 26(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

Senate Report No. 621 of the Committee on Interstate Commerce which accompanied the said Public Utility Holding Company Act of 1935 in referring to Section 11 of the Act states (pp. 32-33):

"Subsection (b) makes it the duty of the Commission after notice and opportunity for hearing, (1) after January 1, 1938 (see subsection (c) below for possibility of extension), by order enforceable only in the Federal Courts of equity, to require each registered holding company, and each subsidiary thereof, to divest itself of any interest in or control over property or persons to the extent that the Commission finds necessary or appropriate to limit the operations of the holding company system of which

such company is a part to a single geographically and economically integrated public utility system and to such business as is reasonably incidental or economically necessary or appropriate to the operations of such system; (a) after January 1, 1938 (with the same possibilities of extension) to require each registered holding company, and each subsidiary company thereof, to be reorganized or dissolved whenever the Commission finds that the corporate structure or continued existence of such company unduly or unnecessarily complicates the structure of the holding company of which it is a part, or unfairly or inequitably distributes voting power among the holders of securities, or is detrimental to the proper functioning of a single geographically and economically integrated public utility system; and (3) promptly after January 1, 1940, to require each registered holding company to take such steps as the Commission finds necessary or appropriate to make such company cease to be a holding company, except the Commission is directed to permit a registered holding company to be a holding company, ...

* * * * * * * * * *

Subsection (c) provides that in any order under subsection (b) the Commission shall fix the time within which such order shall be complied with, not later than one year from the date of such order, but the Commission may, for good cause shown, extend such time for an additional period not exceeding 1 year.

* * * * * * * * * *

Subsections (d), (e) and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under the supervision of the Federal Courts.

* * * * * * * * * *

Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to

work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers.

• • • • • • • • • •

These provisions are framed to bring back to the investor such property interest as he may have in the underlying properties owned by the holding company. They destroy and confiscate no property but they remove the confusing corporate devices and contrivances which have confused the investor and in many cases have been used to deprive him of the fruits of his investment."

Said Senate Report No. 621 in referring to Sections 12 and subsection (c) thereof and 13 of the Act stated (p. 34, 35):

"Complete regulation of intercompany transactions is provided to prevent the milking of operating companies in the interests of the controlling holding company groups. Section 13 below deals specifically with service, sales, and construction contracts within holding-company systems. Section 12 covers other intercompany transactions detrimental to operating companies. The range of practices which this section attempts to reach is broad because unless appropriate discretion is given to the Commission, new devices will spring up and may result in nullifying the provisions of title 1.

• • • • • • • • • •

Subsection (c) makes it unlawful for any company in a holding company system to declare or pay any dividend or to acquire or redeem any of its own securities in contravention of such rules, regulations or order as the Commission may prescribe to protect the financial integrity of such companies, to safeguard their working capital or to prevent

the payment of dividends out of capital or unearned surplus. The exaction of excessive dividends from subsidiary operating companies may be even more harmful than the taking of upstream loans."

Section 20 of the Stock Corporation Law of the State of New York:

"VOLUNTARY SALE OF FRANCHISE AND PROPERTY AND RIGHTS OF OBJECTING STOCKHOLDERS. A stock corporation, except a railroad corporation and except as otherwise provided by law, with the consent of the holders of record of two-thirds of its outstanding shares entitled to vote thereon may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof; but franchises within the state may be sold only to a domestic corporation. Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called pursuant to section forty-five. Any stockholder not voting in favor of such proposed sale and conveyance may at any time prior to the vote thereon—or if notice of the meeting was not mailed to him at least twenty days prior to the taking of such vote, then within twenty days after the mailing of such notice—object to such sale and conveyance and demand payment for his stock, and thereupon such stockholder or the corporation shall have the right, subject to the conditions and provisions of section twenty-one, to have such stock appraised and paid for as provided in said section. Such objection and demand must be in writing and filed with the corporation."

The Certificate of Consolidation of Electric Bond and Share Company contains the following provisions:

"To purchase or otherwise acquire its own shares of stock (so far as may be permitted by law) and its bonds, debentures, notes, scrip or other securities or evidence of indebtedness and to hold, sell, transfer or reissue the same."

and further provides in paragraph numbered (g) thereof:

"The corporation from time to time may purchase any of its stock outstanding (so far as may be permitted by law) at such price as may be fixed by its Board of Directors or Executive Committee and accepted by the holders of the stock purchased, and may resell any stock so purchased at such price as may be fixed by its said Board of Directors or Executive Committee but in case the stock so purchased is subject to redemption, the price paid therefor shall not exceed the price at which it is redeemable."

FILE COPY

JUN 6 1945

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1245.

SAMUEL OKIN, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*,

PETITION FOR WRIT OF CERTIORARI TO CORRECT DIMINUTION OF RECORD.

JAMES L. BOONE,
Attorney for United Gas Corporation.

DANIEL JAMES,
Attorney for Electric Power & Light Corporation.

JOHN F. McLANE,
Attorney for Electric Bond and Share Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1245.

SAMUEL OKIN, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*,

PETITION FOR WRIT OF CERTIORARI TO CORRECT DIMINUTION OF RECORD.

Come now United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company and move this Honorable Court for a writ of certiorari to correct diminution of the record filed with the petition of Samuel Okin for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. In support of this motion said moving parties state and show:

1. Said moving parties joined in and filed an affidavit in support of the motion of the Securities and Exchange Commission before the Circuit Court of Appeals for the Second Circuit on October 2, 1944, for an order dismissing the petition for review filed by Samuel Okin, seeking review by

the said Court of the order issued by the Securities and Exchange Commission on September 7, 1944, in the proceeding before it pertaining to *United Gas Corporation, Electric Power & Light Corporation* and *Electric Bond and Share Company* (Files No. 70-314, 70-315, 59-21, 4-33, 54-91, 70-868).

2. In support of said motion to dismiss said moving parties filed a notice of motion supported by an affidavit of Wallace P. Zachry, sworn to September 27, 1944 (attached hereto as Exhibit I).

3. An order of the Circuit Court of Appeals for the Second Circuit was entered on December 30, 1944, granting said motion and dismissing said petition of Samuel Okin. Samuel Okin filed with this Court on May 8, 1945, a petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review said order entered on December 30, 1944.

4. Said notice of motion and affidavit are a part of the record of the proceedings in the Circuit Court of Appeals for the Second Circuit to which the writ of certiorari is asked to be directed in the petition of Samuel Okin. Said notice of motion and affidavit, however, were omitted from the certified transcript of the record filed in this Court by said Okin with his petition for writ of certiorari.

5. Rule 38 of this Court requires that a petition for writ of certiorari be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. Said notice of motion and affidavit are material parts of the record in this case and should be included in the record filed in this Court.

WHEREFORE, said moving parties pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to correct this diminution of record and for an order making said notice of motion and affidavit a part

of the record in this Court and requiring said notice of motion and affidavit to be printed as a part of the printed transcript of record; and for such other and further relief as to this Court may seem just.

Dated: June 4, 1945.

JAMES L. BOONE,
Attorney for United Gas Corporation.

DANIEL JAMES,
Attorney for Electric Power & Light Corporation.

JOHN F. MCLANE,
Attorney for Electric Bond and Share Company.

EXHIBIT I.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter

of

PETITION OF SAMUEL OKIN, STOCKHOLDER OF ELECTRIC BOND AND SHARE COMPANY, FOR A REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION DATED THE 7TH DAY OF SEPTEMBER, 1944, PERTAINING TO ELECTRIC BOND AND SHARE COMPANY, ELECTRIC POWER & LIGHT CORPORATION AND UNITED GAS CORPORATION, FILES NO. 70-314, 70-315, 59-21, 4-33, 54-91, 70-868.

NOTICE OF MOTION.

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Wallace P. Zachry, sworn to the 27th day of September, 1944, a copy of which is attached hereto, and upon the other papers and proceedings herein, the undersigned will join in the motion to be made by the Securities and Exchange Commission before the Circuit Court of Appeals in the Court Room of said Court, in the Federal Court House, Foley Square, Borough of Manhattan, City of New York, on the 2nd day of October, 1944, at 10:30 in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the petition for review filed herein by Samuel Okin, seeking the review by this Court of the order issued by the Securities and Exchange Commission on September 7, 1944, in the proceedings before it entitled *In the Matter of United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company,* File

No. 54-91 (SEC Holding Company Act Release No. 5271).
Dated: New York, N. Y., September 27, 1944.

Yours, etc.,

REID & PRIEST,
Counsel for United Gas Corporation,
Office and P. O. Addres,
2 Rector Street,
New York 6, N. Y.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Counsel for Electric Power & Light Corporation,
Office and P. O. Address,
63 Wall Street,
New York 5, N. Y.

SIMPSON, THATCHER & BARTLETT,
Counsel for Electric Bond and Share Company,
Office and P. O. Address,
120 Broadway,
New York 5, N. Y.

TO:

SAMUEL OKIN, ESQ.,
32 Broadway,
New York 5, N. Y.

ROGER W. FOSTER, SOLICITOR,
SECURITIES AND EXCHANGE COMMISSION,
18th and Locust Streets,
Philadelphia 3, Pa.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter

of

PETITION OF SAMUEL OKIN, STOCKHOLDER OF ELECTRIC BOND AND SHARE COMPANY, FOR A REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION DATED THE 7TH DAY OF SEPTEMBER, 1944, PERTAINING TO ELECTRIC BOND AND SHARE COMPANY, ELECTRIC POWER & LIGHT CORPORATION AND UNITED GAS CORPORATION, FILES No. 70-314, 70-315, 59-21, 4-33, 54-91, 70-868.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW FILED HEREIN BY SAMUEL OKIN.

UNITED STATES OF AMERICA,)
STATE OF NEW YORK,) ss.:
COUNTY OF NEW YORK,)

WALLACE P. ZACHRY, being duly sworn, deposes and says that:

1. He is a member of the firm of Wright, Gordon, Zachry, Parlin & Cahill, having offices at No. 63 Wall Street in the City of New York. His firm is counsel for Electric Power & Light Corporation (herein called Electric), one of the proponents of the Plan of Reorganization approved by the order here sought to be reviewed and one of the parties to the proceedings below before the Securities and Exchange Commisison. He is personally familiar with the proceedings and other matters herein referred to, except as to the information set forth in paragraphs 6 and 7 hereof, which is stated upon information and belief.

2. United Gas Corporation (herein called United), Electric, and Electric Bond and Share Company (herein called

Bond and Share) join in and support the motion of the Securities and Exchange Commission to dismiss the petition of Samuel Okin to this Court, seeking the review of the Commisison's order of September 7, 1944 (SEC Holding Company Act Release No. 5271, Exhibit A hereto), approving the Plan of Reorganization of United Gas Corporation Under Section 11(e) of the Public Utility Holding Company Act of 1935 (herein called the Plan) (Exhibit B hereto). Said parties join in said motion for dismissal on the ground that Okin's petition to this Court for review pursuant to Section 24(a) of the Public Utility Holding Company Act of 1935 (herein called the Act) is not the proper appellate remedy in this case. The facts bearing upon the foregoing contention are as follows:

I.

3. Although the general power of review whereby orders of the Commission become subject to appellate proceedings is contained in Section 24(a) of the Act, pursuant to which the petitioner Okin has filed his present petition, the Act sets forth a special statutory scheme for the securing of court review of orders of the Commission approving plans filed under Section 11(e) of the Act. Section 11(e) provides for the proceedings before the Commission leading up to the approval of a voluntary plan by the Commission, and after providing for such approval, the Act then goes on to provide:

> "* * * the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the com-

pany or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

4. At the request of the proponents of the United Plan, the Commission filed an application for the enforcement of the terms and provisions of the Plan in the District Court of the United States for the District of Delaware, and on September 8, 1944, the Honorable Paul Leahy, United States District Judge, signed an order which, among other things, provided for a hearing on September 29, 1944, before that Court, looking to such enforcement of the Plan. Said order also provided for the notice to be given by mail and by publication of the holding of said hearing, and a copy of said order has been served upon the petitioner Okin. A copy of the order, together with the related petition and form of notice, is attached hereto as Exhibit C. (It may be mentioned in passing that the order contains certain language enjoining persons from taking any action interfering with the proceedings before the District Court or with the carrying out of the Plan "other than * * * such review, if any, in the Circuit Court of Appeals as may be provided by law." In order to avoid the trial of a false issue, it should be pointed out that the proponents of the Plan do not contend that this injunction has any bearing on the present motion to dismiss.)

5. After hearings shall have been held before Judge Leahy, and when and if an order shall have been entered by him enforcing the Plan, the Commission's order approving the Plan will for the first time be operative, and action thereunder for the first time can be taken. The Plan itself does not contain an application for a final, effective and operative order of the Commission, but contemplates only

a Commission order of approval as a step leading up to an enforcement order of an appropriate District Court of the United States, as provided in the Act. Part V of the Plan provides, among other things, as follows:

> "The effectuation of the Plan is subject to the following conditions and reservations:
>
> • • •
>
> "B. The Commission shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a final decree or order finding the Plan to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act, and such court shall have taken action to enforce and carry out the terms and provisions of the Plan."

Similarly, the order of the Commission approving the Plan and here sought to be reviewed contains the following condition to its effectiveness:

> "IT IS FURTHER ORDERED that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the provisions of sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the Plan.
>
> "IT IS FURTHER ORDERED that this Order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved."

Since both the Plan and the Commission's order are by their terms conditioned upon the entry of an enforcement order by the District Court, it will be only after proceedings shall have been held before the District Court and the favorable order of the District Court shall have been en-

tered that any reviewing appellate court can determine whether the decision on the Plan, embodied in the orders of the Commission and of the District Court, is a lawful and fair and equitable determination of the substantive rights involved, and whether such decision embodied in such Court and Commission orders has accorded to all parties their full procedural and constitutional rights. In such proceedings as this, involving a plan under Section 11(e) of the Act and enforcement of the plan in a District Court under the scheme provided by that section of the Act, it is inconceivable that Congress intended that one Circuit Court of Appeals should review the Commission's order standing alone, which may well be ineffective and therefore give rise to only a moot issue on appeal, and that another Circuit Court of Appeals should review the order of the District Court enforcing the Plan, carrying with it the same Commission order approving the Plan. Such burdensome and expensive and confusing duplication of effort cannot have been the legislative intent.

II.

6. The need for an expeditious determination of the appeal of petitioner Okin cannot be over-emphasized. United is the largest natural gas corporation in the world. Directly and indirectly more than 135,000 security holders are interested in it, and Okin is only one among such 135,000, his holdings amounting to approximately 0.17 per cent of the common stock of the top company, Bond and Share. The cost of maintaining the present capital structure of United is estimated by its management to be approximately $10,000 per day more than the cost will be of maintaining the proposed capital structure upon consummation of the Plan. Moreover, the Plan involves, and its consummation is conditioned upon, the issuance by United of $100,000,000 of new first mortgage bonds which

can be sold in the present money market to institutional investors at the flat price of 100 and at the favorable interest rate of 3 per cent. In the fluctuating state of world affairs which now obtains, United's management, as well as the managements of Electric and of Bond and Share as the direct and indirect parents of United, consider any delay which might jeopardize such favorable bond financing to be highly hazardous to United, Electric, Bond and Share and their respective security holders.

7. In any consideration of whether this Court should expeditiously dispose of petitioner Okin's petition for review, certain facts regarding Okin's activities in connection with matters affecting Bond and Share and its subsidiary companies have a distinct bearing. Okin has on numerous occasions been before this Court and other courts in connection with such matters. See, for example:

Okin v. *Securities and Exchange Commission*, 46 F. Supp. 481 (S. D. N. Y., 1942), *aff'd per curiam*, 130 F. (2d) 903 (C. C. A. 2nd, 1942), cert. denied, 317 U. S. 701 (1943);

Okin v. *Securities and Exchange Commission*, 137 F. (2d) 398 (C. C. A. 2nd, 1943);

Okin v. *Securities and Exchange Commission* (C. C. A. 2nd, July 10, 1944), C. C. H. Federal Securities Law Service, par. 90,256;

Okin v. *Securities and Exchange Commission* (C. C. A. 2nd, July 10, 1944), C. C. H. Federal Securities Law Service, par. 90,257;

Okin v. *Securities and Exchange Commission* (C. C. A. 2nd, July 14, 1944), C. C. H. Federal Securities Law Service, par. 90,258.

Okin has appeared in most of the proceedings before the Commission affecting Bond and Share and its subsidiaries, and when he has appeared, his objections, motions, cross-examination and other activities have usually consumed

substantially more of the record than is consumed by counsel for either the companies or the Commission. Indeed, in the present case it is estimated that more than one-half of the record on the Plan hearings consists of Okin's cross-examination, motions, etc. He has on numerous occasions refused to obey the instructions of the Trial Examiner of the Commission, and has on several occasions become so boisterous that Trial Examiners holding hearings in other hearing rooms of the Commission have had to complain of the interruption of their hearings on other and unrelated matters due to the noise and disturbance caused by Okin. As recently as September 26, 1944, the Commission itself was disturbed in the conduct of a hearing by the shouting of Okin before a Trial Examiner in another hearing, and had to request the Trial Examiner to instruct Okin to conduct himself more properly. The affiant has had a great deal of experience in hearings before Trial Examiners of the Commission, but has never heard of such a complaint with respect to any other lawyer or other person appearing before the Commission or one of its Trial Examiners. On the September 26th occasion, Okin's activities were not confined to shouting at the Trial Examiner. In addition, he burst into a hearing before the Commission, on an unrelated case, interrupted counsel in that matter in his argument, and demanded to be heard by the Commission then and there on a ruling of the Trial Examiner. On several occasions Trial Examiners have had to exclude Okin from further participation in hearings regarding Bond and Share matters because of Okin's obstreperousness. Okin's insistent participation in proceedings before the Commission concerning Bond and Share matters has not been confined to such matters as concern him less indirectly, but he has spent days in cross-examination of witnesses on such remote and contingent questions, from his standpoint, as the fees to be paid by United to plaintiffs' counsel upon the settlement of stockholders' derivative actions affecting that

indirect subsidiary of the corporation in which Okin holds a small common stock interest.

On the basis of the facts hereinbefore set forth, it is earnestly urged that the petition for review filed herein by Samuel Okin, seeking the review by this Court of the order of the Securities and Exchange Commission issued September 7, 1944 (Holding Company Act Release No. 5271), should be dismissed.

WALLACE P. ZACHRY.

Sworn to before me this 27th day of September, 1944.

[NOTARIAL SEAL] MARY F. HEWITT,
Notary Public.

King's Co. Clk's No. 204, Reg. No. 243H6.
N. Y. Co. Clk's No. 614, Reg. No. 332H6
Commission Expires March 30, 1946.

Exhibit A. Order of Securities and Exchange Commission dated September 7, 1944, approving Plan of Reorganization of United Gas Corporation—Printed in transcript of record at pages 62-71, inclusive.

Exhibit B. Plan of Reorganization of United Gas Corporation under Section 11(e) of the Public Utility Holding Company Act of 1935—Included in record but not printed.

Exhibit C. Petition of Securities and Exchange Commission and order thereon dated September 8, 1944, of United States District Court for the District of Delaware providing for hearing on the Plan, etc.—Printed in transcript of record at pages 72-85, inclusive.

FILED
JUN 6 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

This brief is submitted by United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company in opposition to the petition of Samuel Okin for a writ of certiorari to review the order of the Circuit Court of Appeals for the Second Circuit of December 30, 1944 (p. 101), dismissing Okin's petition for review (pp. 1-54) of the order of the Securities and Exchange Commission (pp. 62-71) approving the plan of reorganization of United Gas Corporation under Section 11(e) of the Public Utility Holding Company Act of 1935.*

* For convenience, United Gas Corporation will be referred to herein as "United"; Electric Power & Light Corporation as "Electric"; Electric Bond and Share Company as "Bond and Share"; the Securities and Exchange Commission as "the Commission"; and the Public Utility Holding Company Act of 1935 as "the Act."

The Commission has also filed a brief in opposition to Okin's petition for a writ and in such brief has set forth a statement of most of the relevant facts, as well as statements regarding the opinions below, this Court's jurisdiction, the statute involved and the question presented. We shall not repeat such matters here, but for the purposes of this brief shall adopt the Commission's statements, adding only the facts set forth below.

Additional Facts.

United, Electric and Bond and Share are the parties who subscribed to and filed with the Commission the plan of reorganization constituting the subject matter of this appeal. They were the sole parties to the plan proceeding before the Commission, out of which this appeal grows. They are the persons having large direct financial interests in the plan and the proceedings involving it, and those interests are represented by many millions of dollars.

Yet Okin has proceeded, both in the Circuit Court of Appeals and in this Court, on the assumption that United, Electric and Bond and Share were entitled neither to notice of his appellate activities nor to be heard on his appeal. Okin did not serve on the companies or their counsel any copies of his petition for review in the Circuit Court of Appeals or any notice of the filing thereof. He has served on the companies and their counsel no notice of the filing of his petition for certiorari in this Court and no copy of the petition itself, his supporting brief or the record.

Moreover, Okin attempted to bring his present petition before this Court on a transcript of record which was not complete. In the Circuit Court of Appeals, after learning of the petition for review which Okin had filed there, the companies joined in the Commission's motion to dismiss

and filed an affidavit setting forth facts which were relevant both to the decision by that court and to the granting or withholding of a writ of certiorari here. This affidavit was omitted from the record brought to this Court.

It was only through the courtesy of the Solicitor for the Commission that the companies learned of Okin's present petition for a writ of certiorari, and it is only by putting themselves and this Court to the inconvenience attendant upon a petition for certiorari to correct diminution of the record that the companies will be able to complete the record upon which the decision of this Court regarding the granting or withholding of the writ must rest (see such petition and exhibit thereto, filed at the same time as this brief).

Argument.

For the purposes of this brief, the companies rely upon the arguments set forth in the brief which has been filed by the Commission in opposition to the present petition. In addition to such arguments for denial of the writ, the companies urge that the petition for a writ be dismissed, for the following reasons:

Okin has ignored the companies in connection with his petition for review in the Second Circuit on the theory that Section 24(a) of the Act justifies him in such conduct. The first two sentences of Section 24(a) contain the material upon which Okin predicates his argument:

> "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in

such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered."

The fact that the foregoing statutory provision provides expressly for service upon the Commission is interpreted by Okin as permission to serve no one else—indeed, as meaning that no one other than the petitioner and the Commission are parties to the review proceedings.

At best, such an interpretation of Section 24(a) must be based upon a strained and barrenly technical argument. Such an argument should in no event influence the development of the law when the trend of the argument is toward a result as ridiculous and fruitful of injustice as in this case. Surely the courts should not go out of their way to insure a minority and indirectly interested security holder the right to appeal without notice or hearing being accorded to the persons whose interests are directly and vitally at stake in the appeal. That is what Okin is seeking.

The second sentence in the quotation above from Section 24(a) has a perfectly natural and understandable meaning. Without special provision the Commission would not be a party to an appeal from one of its orders any more than a lower court is a party to an appeal from one of its decrees or orders. Because of the special nature of the administrative proceedings under the Act, it was undoubtedly felt that the Commission should be made a party to appeals from its orders under the Act and should be permitted to be heard in justification of such orders.

Accordingly, the necessary special provision was made for rendering the Commission a respondent in all review proceedings under Section 24(a). That is the purpose of the second sentence of Section 24(a) quoted above.

But this is far from saying that the parties to the Commission proceedings out of which the appeal arises, the persons whose financial interests are vitally at stake, the persons who will be expected to take action affecting the rights of many security holders and involving millions of dollars, are not parties to the appeal, and are to have neither notice thereof nor a right to be heard therein. We submit that Congress assumed such persons to be parties to appeals under Section 24(a) and certainly evidenced no intention of excluding them simply by stating affirmatively that the Commission should be a party.

If we are correct in our interpretation of Section 24(a), the companies were parties to the appeal in the Circuit Court of Appeals and Okin's proceeding in this Court is doubly at fault, for he has also ignored the requirements of paragraph 3 of Rule XXXVIII of this Court's General Rules by failing to serve upon the companies as respondents notice of the filing of the present petition, together with copies of the petition, printed record and his supporting brief.

The argument which we here urge is no mere technicality. The plan of reorganization of United, which Okin calls into question and over which Okin asks this Court to sit in judgment, resulted in changing United from a corporation having three classes of stock aggregating over $141,000,000 and various debt securities aggregating over $50,000,000 into a corporation with a single class of common stock of $106,533,000 and a single class of long-term debt in the amount of $100,000,000. This petition for review, which ignores the issuer and the owners of these

securities, who were the sole parties to the plan proceedings before the Commission, cannot be deemed properly filed in this Court and indeed must be considered as little short of frivolous.

Conclusion.

We respectfully urge that the petition of Samuel Okin for a writ of certiorari herein be dismissed, or in the alternative that it be denied.

June 4, 1945.

Respectfully submitted,

JAMES L. BOONE,
Counsel for United Gas Corporation,
Respondent.

DANIEL JAMES,
Counsel for Electric Power & Light Corporation, *Respondent.*

JOHN F. MACLANE,
Counsel for Electric Bond and Share Company, *Respondent.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION OF UNITED GAS CORPORATION, ELECTRIC POWER & LIGHT CORPORATION AND ELECTRIC BOND AND SHARE COMPANY FOR WRIT OF CERTIORARI TO CORRECT RECORD

BRIEF IN OPPOSITION

United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company were not statutory parties to the review proceedings in the Court below pursuant to Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. sec. 79x(a)) and said companies had not been granted any right of intervention on said proceeding.

The order of the Court below (R. 101) grants the motion of the Securities and Exchange Commission to dismiss the petition for review and the said Court's opinion specifically states that it grants the said Commission's motion (R. 93-94).

Without any statutory authority the aforesaid companies filed with the Court below the notice of motion and affidavit (Exhibit I attached to the petition of said companies in this Court). The Court below did not act on said motion of the said companies, made no determination with respect thereto and made no order thereon, the lower Court merely stating in its opinion (R. 96, footnote 1):

> "Petitioner, in turn, objects to the standing of the three corporations—the debtor and the parent holding companies—to join in support of the Commission's motion, as not that of formal intervenors, a point we need not determine in view of our decision herewith and their obvious interest at least as *amici curiae.*"

Consequently the said notice of motion and affidavit were not part of the record upon which the order of the Court below was made.

Conclusion

The petition of United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company for a writ of certiorari to correct the record should be dismissed or in the alternative denied.

Respectfully submitted,

SAMUEL OKIN,
Attorney for Petitioner,
SAMUEL OKIN

Dated, June 5th, 1945.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission rendered on September 7, 1944, and its order of the same date, have not yet been officially reported but have been published as Holding Company Act Release No. 5271. The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 145 F. 2d 206.

JURISDICTION

The decree of the Circuit Court of Appeals dismissing the petition for review was entered on December 30, 1944 (R. 101). Orders of Mr. Justice Jackson, dated March 27, 1945, and April 26, 1945, extended to May 8, 1945, the period during which

a petition for a writ of certiorari with respect to such order could be filed (R. 102–03). The petition for a writ of certiorari was filed May 8, 1945. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C. § 79x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. § 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79, hereinafter referred to as "the Act"). Sections 11 (e), 18 (f) and 24 (a) thereof (15 U. S. C. §§ 79k (e), 79r (f) and 79x (a)) are set forth in the Appendix, *infra*.

QUESTION PRESENTED

Where the Securities and Exchange Commission has made an order under Section 11 (e) of the Act approving a reorganization plan, which is not to be consummated unless and until approved and enforced by an appropriate district court, may an objecting stockholder challenge the plan by a petition to review the Commission's order in a circuit court of appeals, or is he limited to the district court enforcement proceedings and to an appeal from any adverse order therein?

STATEMENT

Under Section 11 (b) of the Act (15 U. S. C. § 79k (b)), the Securities and Exchange Commission (hereinafter referred to as "the Commission") may order

such action as is necessary to bring about the integration of holding company systems, to simplify their capital structures, and to insure an equitable distribution of voting power among their security holders. Under Section 11 (d) (15 U. S. C. § 79k (d)) the Commission may, if necessary, apply to a court to enforce compliance with any administrative order issued under subsection (b). Of immediate application is Section 11 (e) under which a company may submit its own plan for compliance with the requirements of subsection (b). If, after hearing, the Commission finds such plan necessary to effectuate the provisions of subsection (b) and fair and equitable, it must make an order approving the plan; and thereafter, at the request of the company, the Commission may apply to a federal district court to enforce and carry out the provisions of the plan.

Such a plan (hereinafter referred to as "the Plan") was filed with the Commission on March 6, 1944, by United Gas Corporation (hereinafter referred to as "United"). Joining in the filing of the Plan were Electric Power & Light Corporation (hereinafter referred to as "Electric"), the corporate parent of United, and Electric Bond and Share Company (hereinafter referred to as "Bond and Share"), the corporate parent of Electric. The Plan, in substance, provided for a reorganization of the security structure of United, and for the compromise of all claims in and between United, Electric, and Bond and Share. Briefly stated, United was to issue $100,000,000 of first mortgage bonds, the proceeds of which were to

be used to retire its publicly-held first preferred stock (at a cost of some $53,000,000), and to provide payment of $44,000,000 in cash to Bond and Share in full settlement of all the claims and interests of Bond and Share in and against United, consisting principally of $52,925,000 in debt claims; in addition, various measures proposed for the recapitalization of United were to give it a simplified security structure having a reasonable relation to its earning capacity. Bond and Share conditioned its joinder in the Plan upon obtaining Commission authorization for open market purchases of its outstanding preferred stocks and the same order which approved the Plan gave such authorization upon specified conditions.

The Commission's order approving the Plan was entered on September 7, 1944 (R. 62–71), and on September 8, 1944, the Commission, at the request of the companies, applied to the United States District Court for the District of Delaware for enforcement of the Plan. Both the plan and the Commission's order of September 7 contained an express condition making effectuation of the Plan and of any of the transactions contemplated therein contingent upon entry of an order by the District Court approving and enforcing the Plan (R. 66).

On September 20, 1944, Samuel Okin, the petitioner herein, filed, in the Circuit Court of Appeals for the Second Circuit, a petition to review the Commission's order approving the Plan (R. 1–54). A motion by the Commission for dismissal of the petition for review was heard by that Court on October

2, 1944. This motion was joined in by the interested companies: United, Electric and Bond and Share. The printed record does not contain their moving papers and they have not been named as respondents. The motion was granted in an opinion rendered on October 20, 1944 (R. 93–100), and the order of the Court dismissing the petition for review was entered on December 30, 1944 (R. 101). This is the order which is the subject of the petition for a writ of certiorari.

Meanwhile, the Delaware District Court conducted hearings in the enforcement proceeding before it. Okin participated in that proceeding, introducing evidence and filing a brief in which he voiced his objections to the Plan at considerable length. On November 21, 1944, the District Court entered an order approving and enforcing the Plan. See *In re United Gas Corporation*, 58 F. Supp. 501.

Okin thereafter filed an appeal to the Circuit Court of Appeals for the Third Circuit from the order of the district court. That appeal is now pending and relates only to so much of the order of the District Court as enjoined stockholders and other persons from interfering with steps to be taken to carry out the Plan. Okin did not request the Third Circuit to stay the operation of the plan,[1] and the Plan has, in fact, been fully executed. Whether or not it would be feasible in any respect to set aside the exe-

[1] The Second Circuit had previously denied Okin's motion to restrain the Commission from taking part in the district court proceeding.

cuted Plan in the event that some reviewing court should conclude that the Commission and the district court erred in approving the Plan,[2] we rest our objections to the granting of the writ upon grounds other than mootness.

ARGUMENT

The principal question raised by the petition concerns only the proper court in which petitioner may assert his objections to the Plan. While a decision in accordance with petitioner's construction of the statute would be a source of confusion and inconvenience in the administration of the Act, the only effect of the holding of the court below was to require him to press his objections in a district court, subject to the ordinary provisions for appellate review of district court orders, rather than to permit direct review of the Commission's order of approval in a circuit court of appeals. The decision below is correct and in accord with decisions of other circuit courts of appeals involving related questions.

1. The opinion of the court below reaches the only rational result which takes into account the provisions of Section 11 as well as those of Section 24 of the Act. Section 11 (b) makes it the duty of the Commission to impose by order upon companies in the holding company systems requirements for inte-

[2] Okin's objection to severable portions of the order applicable to Bond and Share's use of funds derived from consummation of the plan is discussed below. It is our information that only a portion of the funds in question has thus far been expended.

gration and simplification. Under Section 11 (c) a year, subject to possible extensions of time for an additional year, is permitted for compliance with an order under 11 (b). By the last sentence of 11 (b) "Any order made under this *subsection* shall be subject to judicial review as provided in section 24" [emphasis supplied]. The reason why this reference to the provisions of Section 24 (providing generally for review in circuit courts of appeals) is expressly limited to orders under subsection (b) becomes apparent when we turn to the provisions of subsections (d), (e) and (f).

Congress contemplated that reorganization techniques should be available for compliance with section 11 (b) orders, and subsections (d) and (e) are in many respects a self-contained reorganization statute with provisions defining the respective reorganization functions of court and agency which are comparable to the relationship between the Interstate Commerce Commission and the courts prescribed in the previously enacted Section 77 of the Bankruptcy Act. Section 11 (f) provides for a similar allocation of function as between the Commission and a reorganization court where the court's reorganization jurisdiction stems from sources other than the Holding Company Act.

Section 11 (d) authorizes the Commission to apply to a District Court to enforce a Section 11 (b) order, and the District Court is authorized, to the extent necessary for such enforcement, to take exclusive jurisdiction, appoint a trustee, and dispose of the

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assets of the company in question "in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing." Such a plan may have been proposed by the Commission in the first instance or by an interested person. Section 11 (e) permits a company subject to the Act to initiate a plan of compliance with Section 11 (b) even in advance of a Section 11 (b) order and, if the Commission approves the company's plan, it may at the request of the company apply for similar court enforcement, dependent upon court approval of the plan, after opportunity for hearing, as fair and equitable and appropriate.[3] The power of the District Court to review the Commission's action in approving a plan is at least as broad as any that could be exercised by the Circuit Court of Appeals, which is not required to give opportunity for hearing to security holders other than petitioner, and which under the Holding Company Act, unlike some federal statutes, has no enforcement jurisdiction.[4] Section 11 (f), applicable

[3] Since court enforcement occurs only at the company's request, an order of the Commission approving a Section 11 (e) plan which does not contemplate court enforcement may be immediately operative to license the transaction concerned, and since such an order deals with the rights of classes of security holders *inter sese*, an objecting member of a class affected would have standing as a person aggrieved to challenge such an order under Section 24 (a). See *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2), denied, 318 U. S. 786.

[4] Compare National Labor Relations Act, Sec. 10(e), (f), 49 Stat. 453 (29 U. S. C. §160(e), (f))

to bankruptcy and other reorganizations in the federal courts, likewise adopts the sequence of approval first by the Commission and then by the reorganization court.

An order of the Commission approving the plan, which is to be operative only if subsequently approved by a district court pursuant to subsection (d) or (e) or under some independent source of jurisdiction recognized in subsection (f), stands on an entirely different footing from the ordinary order of the Commission for which the review provisions of Section 24 (a) were evidently intended. Where the order carries an immediate sanction or is immediately operative to license a transaction, any person "aggrieved" is given by Section 24 (a) sixty days in which to seek review in an appropriate circuit court of appeals.[5] But where the Commission's order approving a plan is only a preliminary step to approval and enforcement thereof by a district court, it is obvious that the order in question is wholly unrelated to the type of order for which Congress designed the review provisions of Section 24 (a). Such an order, while a final order in the sense that it is the last step in proceedings before the Commission, is but an inter-

[5] Section 11 (b) orders do not carry an immediate sanction, but, as previously noted, are nevertheless expressly made reviewable under Section 24 (a). Since, however, Section 11(c) provides for compliance with an order under Section 11(b) within a year subject to extensions of time, this time-lag would cover the normal period for review of such an order. Section 11(e), on the other hand, does not provide for any time-lag between Commission approval of a plan and the institution of enforcement proceedings if requested.

locutory step in a statutory process in which both the administrative agency and the enforcement or reorganization court must act before the order has any effect upon the rights of security holders. For purposes of direct review in a circuit court of appeals Section 24 (a) must be regarded as inapplicable to such a Commission order for the same reasons which led to the decision that general provisions for review of agency orders do not apply to interlocutory orders. See *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375. To the extent that a Commission order approving a plan may be regarded as final with reference to the review of that order which takes place in the enforcement or reorganization court, then that specific procedure for judicial review of the particular order in question must be considered as operative to the exclusion of the general provisions of Section 24 (a). When the enforcement court does act, either enforcing or refusing to enforce the plan, it is the order of the enforcement court upon which further review must focus, and that is governed by the ordinary provisions for appellate review of district court orders.

2. This construction of the Act is bolstered by a consideration of the circumstances that follow upon a contrary construction. If a petition for review could properly be filed, under Section 24 (a), in the Circuit Court of Appeals of the Circuit wherein the "aggrieved" person resides, such court would, upon the filing with it of the administrative record, acquire

"exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." Giving full effect to that language of Section 24 (a) would mean that a single security holder, by electing to file his petition with a circuit court of appeals, can completely displace, so far as other security holders are concerned, the express statutory function of the district court to determine whether the plan is fair and equitable and appropriate. Meanwhile, persons who may have relied upon the published notice of opportunity to be heard in the district court may have suffered the sixty-day period for review to elapse without filing their own petitions. These persons, thus deprived of any opportunity to challenge the plan, may represent entirely different interests and have entirely different objections to the plan from those of the particular security holder whose petition has displaced the Section 11 (e) enforcement proceeding.

If, on the other hand, disposition of the petition for review in the circuit court of appeals would not determine all issues concerning the merits of the plan, the possibility of subsequent attacks on the plan, involving new issues, being made in the district court, and the further possibility of appeals from the district court's order, raise dangers of obstruction and delay. In fact, petitioner Okin has pending an appeal from the enforcement order of the United States District Court for the District of Delaware. While he apparently challenges that Court's action in approving the plan on grounds unrelated to the

issues raised in his petition for review, he was not, if aggrieved, limited as to the grounds he might urge on appeal from the order of the district court.

In connection with another pending Section 11 (e) plan, involving Standard Gas and Electric Company,[6] in which enforcement was sought by the Commission in the United States District Court for the District of Delaware, an objecting security holder filed in the Circuit Court of Appeals for the Fourth Circuit a petition for review of the Commission's order approving the plan.[7] As in the present case, the Commission moved to dismiss that petition for review, but before this motion came on for hearing in the Fourth Circuit, the District Court had entered an order refusing to approve the plan in question,[8] and the Commission had announced its intention to appeal to the Circuit Court of Appeals for the Third Circuit. Thereupon, the petition for review filed in the Fourth Circuit was abandoned. Had the petitioner in the Fourth Circuit persisted and had the Fourth Circuit entertained the petition, the Commission and the parties would now be confronted with competitive proceedings in two circuits involving overlapping questions.

3. The possibilities of confusion and waste alluded to above need hardly be elaborated. They arise

[6] *Standard Gas and Electric Company*, Holding Company Act Release No. 5430.

[7] *Fleischmann* v. *Securities and Exchange Commission* (C. C. A. 4, No. 5345).

[8] *In the Matter of Standard Gas and Electric Company*, 59 F. Supp. 274 (D. Del.).

from the fact that the type of order which petitioner has sought to review in the Second Circuit is but a preliminary step in a statutory procedure necessitating approval of the plan by both Commission and enforcement court. As this Court stated, concerning the essentially similar procedure set forth in Section 77 of the Bankruptcy Act, 11 U. S. C. § 205, requiring advance approval by the Interstate Commerce Commission of reorganization plans involving railroads, the function of the Commission and the function of the district court are thoroughly "brigaded" and "intertwined" in such a proceeding. *Palmer* v. *Massachusetts*, 308 U. S. 79, 87.

Where such a statute provides for a sequence of action before the Commission and a court, the subsequent court consideration of the problem theretofore considered by the agency has been recognized by this Court to involve the ordinary function of judicial review. See *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 168–70. And, with specific reference to approval of reorganization plans, the function of approval of the plan in the District Court under Section 77 of the Bankruptcy Act, after prior approval by the Interstate Commerce Commission, has been held to preclude review of the Interstate Commerce Commission's order in a three-judge court under a general provision in the Urgent Deficiencies Act [9] for the review of "any order of the Interstate Commerce Commission." See *Chicago &*

[9] Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 220, 28 U. S. C. § 47.

North Western Railway Co. v. *United States*, 320 U. S. 718, affirming *Chicago & North Western Railway Co.* v. *United States*, 52 F. Supp. 65 (N. D. Ill.).

The decisions and practice under the Holding Company Act are likewise in harmony with the decision of the court below. Thus, notwithstanding the general review provision of Section 24 (a) of the Act, the Circuit Court of Appeals for the Seventh Circuit has dismissed a petition, filed under that section, to review an order of the Commission approving, under Section 11 (f) of the Act, the reorganization plans of two companies which were the subject of Chapter X proceedings in a district court. *Gilbert* v. *Securities and Exchange Commission*, 146 F. 2d 513. A plan of reorganization approved by the Commission and a bankruptcy reorganization court has been considered by a circuit court of appeals on appeal from the decision of the district court approving a plan. *In the matter of Associated Gas and Electric Company* (C. C. A. 2, Nos. 203–204, decided March 27, 1945). And in the case of plans of reorganization approved under Section 11 (e), the objectors who have been unsuccessful in resisting approval thereof by a district court have found available the usual avenues for appeal from district court orders. That was the procedure followed in *Otis & Company* v. *Securities and Exchange Commission*, No. 81, this Term, and in *Disman* v. *Securities and Exchange Commission*, certiorari denied, No. 1181, this Term.

Petitioner sees conflict in a ruling of the Circuit Court of Appeals for the Third Circuit preliminary

to the action reported as *Marquis and Company* v. *Securities and Exchange Commission*, 134 F. 2d 822 (C. C. A. 3). In that case the plan of reorganization, unlike the instant plan, as approved by the Commission did not specifically describe the mode of enforcement contemplated by the plan and proponents of the plan endeavored to consummate it by obtaining requisite votes under State law. It is the Commission's position that such an order is reviewable in a circuit court of appeals, and a petition for review was filed prior to any request by the company for court enforcement of the plan. *Cf. Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2), certiorari denied, 318 U. S. 786.[10] The Commission accordingly had not initially challenged the reviewability of the order and had filed with the Circuit Court of Appeals for the Third Circuit the transcript

[10] Petitioner urges that the opinion below rests upon a purported ouster of the jurisdiction of the circuit court of appeals by virtue of a provision in the order of the Commission (Pet. 32). In our view, the lack of jurisdiction of the circuit court of appeals rests upon the incompatibility of the review provisions of Section 24 (a) as applied to a situation where a plan approved by the Commission's order is to be consummated only in the event of further approval by the enforcement court. We believe that this follows from the mere fact of the proponent company's having requested court enforcement, or, in any event, from the institution of enforcement proceedings. The only effect of the express provision in the plan and Commission order criticized by petitioner is to make it clear that there is no possibility of the Commission's order being operative as a "licensing" order irrespective of approval by the enforcement court.

of the administrative record, thereby making applicable the language of Section 24 (a) which provides that: "Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." Thereafter, the companies involved decided that they could not execute the plan without judicial aid, and, at their request, the Commission instituted an enforcement proceeding in the Delaware District Court. The Commission then moved to stay the Circuit Court of Appeals proceeding pending action by the District Court. The motion was denied. Since there was no opinion, it is a matter of speculation whether the denial of the stay was on discretionary considerations, such as the essential similarity of the issues, or because of the applicability of the "exclusive jurisdiction" language of Section 24 (a). Insofar as a jurisdictional ruling may have been implicit in the denial of a stay and the subsequent affirmance of the Commission's order, the decision is only that jurisdiction of a circuit court of appeals which once attaches pursuant to Section 24 (a) will not be defeated by the institution of district court enforcement proceedings after the administrative transcript has been filed in the circuit court of appeals.[11] While the *Marquis* case did present a troublesome problem of procedure, it was not the problem presented in this case, as the court below recognized

[11] Here, of course, it is to the Delaware District Court, rather than the circuit court of appeals, that the Commission has certified the record of the proceeding before it.

(R. 99–100). Thus the petition does not present a case of conflicting decisions in the circuit courts of appeals.

4. Petitioner's second ground for the writ is that "the Commission's order to the extent that it approved the declaration of Bond and Share for the use of $44,000,000 in the acquisition of its preferred stock and attached certain terms and conditions thereto can only be reviewed under Section 24 (a) of the Act." (Pet., p. 41.) We believe that petitioner is correct in treating the portion of the Commission's order which licensed Bond and Share's use of proceeds derived from the plan as severable from its order approving the plan of reorganization of United. That part of the order was not within the scope of the enforcement proceeding in the District Court and, therefore, if reviewable by petitioner, could be reviewed only in a circuit court of appeals pursuant to Section 24 (a) of the Act. It would follow that if petitioner had a basis for challenging that portion of the Commission's order, and had sought review thereof as a separate matter independent of his attack on the plan, we would concede the jurisdiction of the circuit court of appeals over that portion of the petition.

As petitioner states, the lower court in its opinion makes no reference to this phase of the order. Apparently the lower court did not understand that petitioner was attempting to challenge this portion of the Commission's order as a severable matter apart from his objection to the Plan. Whether or

not this was in fact the then position of the petitioner is by no means clear from the papers which he submitted in the court below. However, in view of the vague and insubstantial character of his objections to this portion of the Commission's order, which were obscured by the prolixity of the papers filed with the court below, we submit that any misapprehension as to petitioner's position would not be reversible error.[12]

[12] The court below has elsewhere indicated its difficulty in following the arguments of the present petitioner. *Okin* v. *Securities and Exchange Commission*, 145 F. 2d 913, 914. In the instant case, petitioner submitted to the Circuit Court a 36-page petition for review, a 51-page affidavit in support of a motion for a stay, a 7-page affidavit in opposition to the Commission's motion to dismiss, and a 72-page brief. Such references as were made to petitioner's objection to this portion of the Commission's order did not make the further point now urged in the petition for certiorari that the issue was severable from petitioner's objections to the plan and a matter reviewable only in a circuit court of appeals.

The objection was made in paragraph 41 of the petition for review (R. 53), and thereafter the sole references thereto were made in the affidavit and brief in opposition to the dismissal motion. These references are here set forth in their entirety:

Affidavit: "It is advisable at this point to remind this Court that the said order of the Commission approves many other matters besides the approval of the plan" (R. 90).

Brief: "At the outset it is important to note that in their anxiety to convince this Court that it should not review the order claimed to have been made under Section 11 (e) of the Act, counsel for the Commission and the other companies forgot to tell this Court that many other matters were involved in the order of the Commission besides the plan and that many other sections of the Act are involved in addition to Section 11 (e). However, at this point we

Turning to the nature of the objections in question, we do not understand that petitioner objects to Bond and Share purchasing its outstanding preferred stock. Apparently he would prefer a program which would include invitations for tenders from holders of Bond and Share preferred stock rather than market purchases as proposed by the management and as limited by the Commission's order. As currently phrased, the objection to this part of the Commission's order is that it "attached conditions and terms wholly without authority in law and beyond any jurisdiction of the Commission" (Pet., p. 42). The only conditions which restrict Bond and Share relate to such matters as disclosures to the Commission and to security holders, the duration of the authorization to purchase and a requirement for cancellation of the stock reacquired (R. 66, 67, conditions 1 to 6, inclusive). By conditions 7 and 8 the Commission reserves jurisdiction to consider substitute or additional programs with respect to the use of the money and to rescind or modify its order.

Since the order left Bond and Share free to apply for further and broader authorization with respect to the use of cash derived from the Plan, and, of course, to seek judicial review of any future adverse order, petitioner's present difference with the Bond

will confine our argument to a consideration of the matters presented under Section 11 (e) and refer to the other provisions of the order and other sections of the Act involved at a latter point herein." This statement appeared at page 59 of the 72-page brief, and the matter was not discussed again despite the assertion that it would be.

and Share management can relate only to the timing of its efforts to obtain a release from any restrictions with which Bond and Share would not voluntarily comply. Thus, even if for reasons not revealed by petitioner, there could be some legal objection which might be urged on behalf of Bond and Share to any of the conditions restricting Bond and Share's authorization to purchase its preferred stock, petitioner has shown no present justification for displacing the management in its decision not to litigate the issue at this time. In that respect we believe that petitioner's objections to those provisions of the order which are severable from the Commission's approval of the plan are insufficient to give him standing to sue for the same reasons as were recently presented to this Court in *Securities and Exchange Commission* v. *Okin*, No. 815, this Term.[13] Even if this

[13] For similar reasons we believe that Okin, as a stockholder of Bond and Share, was not a "person aggrieved" with standing to challenge the fairness of the plan to Bond and Share. We would not, of course, challenge the standing of a public stockholder of United Gas to attack the treatment accorded him in the plan, since the plan was a plan of reorganization of United Gas. Nor would we challenge the standing of public security holders of Electric to challenge the treatment of its claim, *vis-a-vis* Bond and Share, in view of the dominant position of Bond and Share and the conflict of interest involved. However, Okin has indicated no reason why the Bond and Share management was not free to represent the interests of Bond and Share in negotiating the compromise embodied in the plan. While this point was raised by the Commission in the court below as a matter of consistency with its position in other cases, no attempt was made to reargue the point in view of the prior ruling of the court below in the *American & Foreign Power* case, now pending as No. 815 in this Court.

Court should be of the opinion that petitioner is aggrieved and that the frivolous character of his objections would not warrant dismissal prior to the filing of a transcript of the record upon which the order complained of was entered, the failure to observe that formality in this case can hardly have prejudiced petitioner, in view of the patently insubstantial objections to this portion of the order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Section 11 (e) of the Public Utility Holding Company Act provides as follows:

> In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall

have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Section 18 (f) of the Act provides as follows:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

Section 24 of the Act provides as follows:

> (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order,

a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall

be final, subject to review by the Supreme Court of the United Stats upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 1245. OKIN *v.* SECURITIES & EXCHANGE COMMISSION. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. June 18, 1945. *Per Curiam:* On consideration of the suggestion of a diminution of the record and a motion for a writ of certiorari in that relation, the motion for certiorari is granted. The petition for writ of certiorari is granted limited to the question whether that part of the Commission's order which licensed Electric Bond and Share Company's use of the proceeds derived from the plan of reorganization can be reviewed only under § 24 (a) of the Public Utility Hold-

ing Company Act. The judgment is vacated and the cause is remanded to the Circuit Court of Appeals for consideration of that question. *Mr. Samuel Okin* for petitioner. *Assistant Solicitor General Cox* and *Mr. Roger S. Foster* for respondent. *Messrs. James L. Boone* and *Daniel James* for the United Gas Corporation et al., petitioning for writ of certiorari to correct diminution of the record. Reported below: 145 F. 2d 206.